

succession to ancestral property. The learned counsel for the appellants, however, stated that he did not press for a decree for this small area, provided he was excused from paying the costs of this litigation. Acting on his suggestion, we dismiss the appeal, but direct that the parties bear their own costs throughout.

A. N. C.

Appeal dismissed.

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GANGA RAM
v.
NARANJAN
DASS.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

GURMUKH SINGH (DECREE-HOLDER) Appellant
versus
HARI CHAND AND OTHERS (JUDGMENT-DEBTORS)
Respondents.

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Feb. 28.

Civil Appeal No. 324 of 1932.

Civil Procedure Code, Act V of 1908, Order XXXIV, rules 5, 6: Application by puisne mortgagee for sale of mortgaged property — which has already been sold under decree of a prior mortgagee — Whether application for a personal decree is barred by rule 6.

Held, that where a puisne mortgagee applies to have the mortgaged property sold under Order XXXIV, rule 5 of the Civil Procedure Code, and it appears that the property has already been sold in execution of a decree of the prior mortgagee and there does not exist any part of the mortgaged property which can be sold, an application for a personal decree against the mortgagee should be granted, Order XXXIV, rule 6, being no bar to the grant of a personal decree.

Shyam Behari v. Mst. Mohandei (1), not followed.

Other case-law, discussed.

First Appeal from the order of Chaudhri Kanwar Singh, Senior Subordinate Judge, Gujranwala, dated 26th November, 1931, holding that the application of

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the decree-holder for a personal decree is not maintainable under Order XXXIV, rule 6.

SHAMAIR CHAND and QABUL CHAND, for Appellant.

ACHHRU RAM, for Respondents.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—The material facts of the case giving rise to this appeal are these:—

Kanshi Ram, *Marwaha*, mortgaged a house to *Seth* Gurmukh Singh on the 19th August, 1921, for Rs.6,000. The house was already under mortgage with the Punjab Sindh Bank, Limited. On the 16th August, 1923, the Bank brought a suit on the foot of its mortgage and obtained a decree for the sale of the house. Gurmukh Singh on his own application was impleaded as a defendant in that case. He claimed priority over the Bank, but his claim was rejected. From this order he appealed to this Court and while the appeal was still pending here, he instituted a suit on the basis of his own mortgage on the 1st March, 1929. In his plaint he stated that as it had been declared in the suit by the Bank that it had a preferential claim to the house, he was entitled to recover his demand from the person and the other property of the mortgagor. He consequently made a prayer that a decree be passed in his favour against the equity of redemption of the mortgaged house as also against the person and other property of the mortgagor. This suit was decreed on the 13th November, 1929, and a preliminary decree passed in his favour, but the decree was for sale of the mortgaged house only. A decree-sheet under Order 34, rule 4, Civil Procedure Code, was drawn up in accordance with the judgment and

stated that if the decretal amount was not paid on or before the 15th January, 1930, the mortgaged property will be sold and if the net proceeds of the sale were found insufficient to meet the plaintiff's demand, he shall be at liberty to apply for a personal decree for the amount due.

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On the 22nd January, 1930, Gurmukh Singh applied for a final decree and reiterated his prayer for a personal decree for the entire demand under Order 34, rule 6. On the 20th February, 1930, the house was sold in execution of the decree of the Bank and the entire proceeds of sale paid to the Bank. On the 1st March, 1930, the Bank filed a written statement urging that as the mortgaged property had been sold in its decree, Gurmukh Singh's prayer for a final decree had become infructuous. On the 1st April, 1930, Kanshi Ram also put in his pleas resisting the mortgagee's prayer for action under Order 34, rule 6. On the same date, the Senior Subordinate Judge passed the final decree in Gurmukh Singh's favour and in the order that he recorded, he remarked that the mortgagee agreed to apply for a personal decree by a separate application.

On the 8th April, 1930, Gurmukh Singh presented an application for a personal decree under Order 34, rule 6. The mortgagor resisted this application on the ground *inter alia* that no property having been sold under Order 34, rule 5, in execution of the mortgagee's decree, action under Order 34, rule 6, could not be taken. The Senior Subordinate Judge agreed with this contention and passed an order on the 16th October, 1930, rejecting the mortgagee's application on the ground that as no sale had taken place under the

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mortgagee's decree, his application for a personal decree was not maintainable *at that stage*.

On the 20th November, 1930, Gurmukh Singh applied that the mortgaged property be sold under Order 34, rule 5. On the 2nd February, 1931, the Manager of the Bank appeared in Court and made a statement that the mortgaged property had already been sold in satisfaction of the decree of the Bank and there did not exist any part of the mortgaged property which could be sold. Thereupon, the Senior Subordinate Judge dismissed the mortgagee's application for sale.

On the 9th February, 1931, the mortgagee filed the present application, which has given rise to this appeal. He stated therein that he had observed the formality of applying under Order 34, rule 5, and as his application had been dismissed by the Court on the ground that no property existed which could be sold, he may now be granted a personal decree against the mortgagor. The mortgagor resisted this application on various grounds. He contended that the order, dated the 16th October, 1930, rejecting the mortgagee's application for a personal decree had become final, and consequently the present application was barred by the rule of *res judicata*. He further urged that the final decree merely provided for the sale of the mortgaged property and as it was not appealed against, the mortgagee could not now ask for a personal decree. It is significant that no objection was raised on the ground that no application could be made under Order 34, rule 6, as no sale had taken place under Order 34, rule 5. In spite of this, the Senior Subordinate Judge appears to have merely reproduced the order that had been passed on the 16th

October and without deciding the plea of *res judicata* and the infructuous nature of the final decree, relied on the same authority on which his predecessor had done and rejected the mortgagee's application on the ground that as no sale had been held under Order 34, rule 5, no application under Order 34, rule 6, was competent. From this order the mortgagee has appealed.

After hearing counsel for the parties on the various contentions raised by them, we have come to the conclusion that the judgment of the Senior Subordinate Judge cannot be maintained. There is ample authority in support of the proposition that if there is no property available for sale under Order 34, rule 5, a personal decree can still be passed against the mortgagor. In *Jowala Das v. Wazir Chand* (1), a mortgagee had obtained a mortgage decree on a mortgage executed by the father of a joint Hindu family and had reserved to himself liberty to apply for a personal decree against the mortgagor in the event of the sale-proceeds being found insufficient to pay off the decretal amount. The property was sold in execution of the decree, but before the confirmation of the sale, the sons of the mortgagor filed a suit for a declaration that the mortgage was not binding on them, which declaration was granted and the sale price was refunded to the auction-purchaser. A Division Bench of this Court held that the conditional clause in the decree regarding the personal decree became operative, that the mortgagee was entitled to move the executing Court to pass a personal decree under Order 34, rule 6, and that the declaration granted to the sons did not bar the mortgagee from applying for a personal decree and proceeding against his property. In *Zulfiqar Ali*

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v. *D. A. V. College* (1), Jai Lal and Abdul Rashid JJ. held under similar circumstances that as the mortgaged property was not available for sale owing to circumstances for which the mortgagee was not responsible, there was no bar against him to obtain a personal decree for the whole of the amount due to him.

In *Bisheswar Nath v. Chandu Lal* (2), a Division Bench of the Allahabad High Court laid down that where property, the subject of a suit for sale on a mortgage had ceased to be available for sale owing to no fault of the mortgagee, the mortgagee was entitled to a personal decree, though that decree may not fall within Order 34, rule 6, or even be based, by analogy with Order 34, rule 6, on any legal fiction that there had been a sale. This ruling was followed in *Zulfikar Ali v. D. A. V. College* (1), quoted above.

In *Tharia Ram v. Mahla Ram* (3), Bhide J. observed as follows:—

“ A personal decree can be passed under Order 34, rule 6, when the mortgaged property ceases to be available for the benefit of a mortgagee owing to the claim of third parties and not through any fault of the mortgagee himself.”

In *Adhar Chandra Naskar v. Saruwamoyi Dasi* (4), a Division Bench of the Calcutta High Court laid down that the Court will not make a fruitless attempt to sell the property which was already sold in order to enable a mortgagee to apply under Order 34, rule 6. In order that the application for a personal decree should be held to be untenable, there must be something which the mortgagee should be able to recover by such sale.

(1) 1933 A. I. R. (Lah.) 792.

(3) (1934) I. L. R. 15 Lah. 607.

(2) (1928) I. L. R. 50 All. 321.

(4) 1929 A. I. R. (Cal.) 121.

It will be obvious, therefore, that this Court has, in concurrence with the Allahabad and Calcutta High Courts, uniformly taken this position that even if no sale was held under Order 34, rule 5, in circumstances similar to those existing in the present case, an application under Order 34, rule 6 could be maintained.

The Senior Subordinate Judge relied on a Full Bench decision of the Oudh Chief Court *Shyam Behari v. Mst. Mohandei* (1). It is no doubt true that that decision laid down that an application for a personal decree Order 34, rule 6, was not maintainable, unless a sale in pursuance of Order 34, rule 5 (2), had as a matter of fact taken place. But, with all respect, we do not agree with the restricted interpretation placed by the learned Judges on the terms of Order 34, rule 6. We do not consider that it was the intention of the Legislature to deprive the mortgagee of his entire rights, if, after the mortgage decree that he had obtained, the property ceased to exist for no fault of his. The cardinal principle of the interpretation of statutes is that they should not be interpreted in a manner which may make them appear absurd. We are, therefore, fully justified in assuming that rule 6 applies only to those cases where there is available some property which can be sold, and if there be none whatsoever, a mortgagee cannot be expected to have a non-existing thing sold before being able to realize his demand.

In the result, we set aside the order of the Senior Subordinate Judge and accept this appeal. In the peculiar circumstances of the case, we make no order as to costs.

A. N. C.

Appeal accepted.

(1) 1930 A. I. R. (Oudh) 377 (F. B.).