

(1925) 09 MAD CK 0038
In the Madras High Court

Bulkee Bee and Others

APPELLANT

Vs

Kaka Hajee Muhammad Ummar Sahib and Others

RESPONDENT

Date of Decision : 23-09-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 6

Citation : AIR 1926 Mad 415 : (1926) 50 MLJ 39

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—Respondents 1 and 2 herein are the transferee decree-holders of the mortgage decree in O.S. No. 40 of 1912 passed on the

5th March, 1914. The mortgaged properties were sold but the sale proceeds were not sufficient to cover the decree amount. They applied to the

Lower Court for execution against the property of the mortgagors not covered by the mortgage. The mortgagors objected to the execution on the

ground that there was no personal decree against them and that the application was barred by limitation. The learned District Judge overruled the

objection and allowed execution to proceed against the property of the judgment-debtors not covered by the mortgage. The judgment-debtors

have preferred this appeal.

2. It is contended by Mr. Viswanatha Aiyar for the appellants that no decree was passed under Order 34, Rule 6, and therefore there is no

personal decree against the mortgagors and the order of the District Judge is wrong. The decree passed on 5th March, 1914, was only a

preliminary decree and the final decree was passed on the 27th August, 1914. In the final decree no provision was made for proceeding against

the properties other than those covered by the mortgage; and no personal decree was passed against the mortgagors under Rule 6. The question is

whether the decree as it is can be executed against the properties of the judgment-debtors other than those covered by the mortgage.

3. Under the present Code of Civil Procedure, in the case of a mortgage, preliminary decree is passed under Rule 4 of Order 34. If the

mortgagor-defendant does not pay into Court the amount mentioned in the preliminary decree within the time fixed in the decree, a final decree for

sale has to be passed under Rule 5, and if the proceeds of the sale of the mortgaged property are not sufficient to cover the decree amount, a

personal decree for the balance has to be passed under Rule 6. It is the decree that is passed under Rule 6 that is executable against the

mortgagors personally. In the absence of a decree under Rule 6 the mortgagee is not entitled to proceed against the property of the mortgagors

other than those covered by the mortgage.

4. It is contended by Mr. K.S. Krishnaswami Aiyangar that inasmuch as the final decree does not contain a provision for personal remedy against

the mortgagors the direction in the preliminary decree for payment of the amount should be taken to give a personal remedy and that decree could

be executed against them. The contention that a preliminary decree is capable of execution is on the face of it untenable. *Ram Brichh Rai v. Deo*

Tewari ILR (1921) A. 166 is relied on. In that case the Court passed a simple money decree for a portion of the claim which was not borrowed

for legal necessity and a mortgage decree for the rest. The decree in that case gave two different reliefs to the decree-holders, one against the

property and the other a simple money decree. The simple money decree was not a portion of the mortgage decree, nor was it in consequence of

the sale proceeds of the mortgaged property not being sufficient to cover the amount of the decree. That case, therefore, has no application to the

present case. *Cheruvalath Kumbanari Vala Kathala Erechain v. Theyyatath Karan* (1914) M.W.N. 497. *Periyasami Kone v. Muthia Chatty* ILR

(1913) Mad. 677 and *The Rajah of Kalahasti Vs. Rajah Kumara Venkata Perumal Raj Bahadur Varu, Minor by guardian Mr. W.A.*

Vardachariar and Another, do not help the respondents. In all these cases the decrees were passed under the old Code of Civil Procedure. Under

that Code it was usual to pass one decree directing the sale of the mortgaged property and to provide that if the sale proceeds of the mortgaged

property were not sufficient to cover the decree amount, the other properties of the mortgagors should be proceeded against. Under the present

Code no such decree could be passed. The case of *Shiba Durga v. Gopi* (1915) 23 C.L.J. 573 relied on by the respondents is against their

contention. The learned Judges observe at page 577:

It may be more correct to say that it is the final decree which makes the preliminary decree operative and effectual and renders it enforceable in

execution. In that view it is the final decree which is executed. It is idle to say that the personal remedy which the decree-holder is seeking to

enforce is to be found in the preliminary decree. The personal decree was not available till after the mortgaged properties had been sold under the

decree absolute.

5. It has been decided by the Privy Council in *Ashfaq Husain v. Gauri Sahai* ILR (1911) A. 264 that a preliminary decree is not capable of

execution and that it is only a decree absolute under Rule 5 of Order 34 that can be executed. This decision was followed by *Miller and Sadasiva*

Aiyar, JJ. in C.M.S.A. No. 86 of 1910 and by *Benson and Sundara Aiyar, JJ.* in C.M.A. No. 269 of 1911.

6. Till the mortgaged properties are sold it is not possible to say whether the sale proceeds would be sufficient to pay off the decree amount. It is

only when the sale proceeds are not sufficient to cover the whole of the decree amount that the personal liability to pay the balance arises, granting

that the document sued on provides for personal remedy against the mortgagor and a preliminary decree cannot therefore give a personal remedy

against the mortgagor.

7. In C.M.P. No. 111 of 1920 respondents 1 and 2 applied to the District Court of North Arcot for a personal decree under Rule 6 of Order 34.

Mr. Hughes, who was then the District Judge, dismissed the petition on the ground that there was already a personal decree. This order was not

appealed against and is binding on the parties. Respondents 1 and 2 hereto cannot now ask for passing a final decree under Rule 6 inasmuch as

such relief was denied to them by the order in C.M.P. No. 111 of 1920.

8. In the view we have taken it is unnecessary to consider whether the

application of respondents 1 and 2 is barred by limitation.

In the result the appeal is allowed and the order of the District Judge is set aside with costs throughout.