

(1927) 07 AHC CK 0034
In the Allahabad High Court

Sahu Bisheshar Nath and Others

APPELLANT

Vs

Chandu Lal and Others

RESPONDENT

Date of Decision : 07-07-1927

Acts Referred:

Citation : (1927) 07 AHC CK 0034

Hon'ble Judges : Boys, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Boys, J.—This is a decree-holder's application purporting to be under Order 34, Rule 6, and asking for a decree, not for a balance due after a sale but for the total amount of the decree, on the ground that any sale now applied for and carried out would be inevitably infructuous owing to no fault of the mortgagee decree-holder. The facts are that the judgment-debtor executed a simple mortgage in favour of the present decree-holder on the 16th January 1908. On this mortgage a suit was instituted on the 20th November 1913, and a preliminary decree was obtained on the 22nd December 1913, ex parte. A third party, with whom we are not now concerned, brought a suit against the mortgagor, to which he also made the mortgagee a party, for a declaration that the mortgagor had no title in the property mortgaged, and obtained a decree on 15th December 1915. On 23rd September 1916, the mortgagee obtained a final decree.

2. The question that now arose for the mortgagee was whether he was to apply for sale under that decree, or what was his remedy, in view of the fact that it had already been declared in a suit to which he was a party that his mortgagor had no title. We have no information what steps, if any, he took, though presumably he took some, between the 23rd September 1916 and 8th September 1922. As we have no information of what occurred in this interval it must be presumed that he did something to keep his decree alive, for no question has been raised as to that decree having become barred by limitation. The only matter which we

find is a note by the Munsarim at the foot of the present application which says:

The application is beyond time from the date of the decree passed in the original suit.

3. No issue appears to have been framed on this, and we must, therefore, take it that the application was made within three years of the last proceeding in execution and that the decree must be taken to have been alive at the date of the application so that an ordinary application for sale would, at the date of the present application, not have been barred by limitation. Again, if the present application can be properly regarded as one under Order 34, Rule 6, it might further be arguable at least that an application under Order 34, Rule 6 is in the nature of an application for execution and that, as such an application, the application in its present form also is not barred by limitation. It becomes necessary, then, to determine whether an application for a personal decree, where there has been no sale at all but the mortgagor has been found subsequently to the decree to have no rights, and where the mortgagee has not been to blame, is an application within Order 34, Rule 6.

4. The trial Court gave the decree-holder a decree under Order 34, Rule 6 relying on the cases of Brijbehari Lal v. Indarpal Singh [1920] 23 O.C. 145 and Pirbhu Narain Singh v. Amir Singh [1907] 29 All. 369. The lower appellate Court set aside the decree of the trial Court and dismissed the application relying on Behari Lal v. Bisheshar Dayal [1912] 9 A.L.J. 569 and Darbari Mal v. Moola Singh [1920] 42 All. 519.

5. We have considered the following cases: Kedar Nath v. Chandra Mal [1903] 26 All. 25 Ghafur v. Mahomed [1905] 28 All. 19 Pirbhu v. Baldeo [1907] 29 All. 260 Pirbhu v. Amir Singh [1907] 29 All. 369 Ram Raghubir v. Imami Begam [1911] 14 O.C. 217 Sheodin v. Bhawani [1911] 14 O.C. 62 Bihari v. Bisheshar [1912] 9 A.L.J. 569 Satish Ranjan v. Mercantile Bank [1918] 45 Cal. 702 Brijbehari Lal v. Indarpal Singh [1920] 23 O.C. 145 Darbari v. Mula [1920] 42 All. 519 and Badal Singh and Others Vs. Debi Saran Dhar Dube, but in the view that we take, it is necessary to consider them in detail.

6. Two considerations are manifest at the outset. Firstly, that if the decree-holder has, apart from his having allowed his remedy to become barred by limitation, no remedy, he will be the victim of an injustice. Secondly, that it is only by doing violence to the plain language of Order 34, Rule 6, that an application, such as the present where there has been no sale, can be held to be supported by the terms of that rule.

7. It would seem to be the first of these considerations which has led in some of the decided cases, and, in the seeming absence of any other remedy, to decisions that applications similar to the present one come within Order 34, Rule 6. This is the position which we have to consider.

8. Where the right to a personal decree is barred by limitation at the time of

filing the suit it has gone altogether and cannot be revived at all, either on the discovery that the mortgagor had no title to any of the property, or after a sale of the whole or part of the property has resulted in a deficiency. The mortgagee has deliberately chosen to let that right go and there is an end of the matter. Where, however, the right to a personal decree is not barred by limitation at the time of filing the suit, what is the position? The mortgagee can get a decree for sale, and though it is of no immediate use to him, no harm is done if that decree is combined with conditional decree under Order 34, Rule 6-Jeuna Bahu v. Parmeshwar AIR 1918 P.C. 159 but he cannot get at the same time as his decree for sale an unrestricted personal decree. It may be noted that there is apparently no statutory basis for refusing the immediate grant of an unrestricted personal decree, but the Courts have evolved and declared this rule, for it would clearly be absurd to give the mortgagor the time allowed for payment under a decree for sale and at the same time allow the mortgagee to proceed *instanter* under a personal decree. What, then, happens to the mortgagee's right to an unrestricted personal decree if he has it at the date of suit but cannot be allowed to take it at the same time as his decree for sale?

9. It has always been understood and conceded that the right to a personal decree is not wholly destroyed, for a right to a personal decree, at least under certain conditions, is merely suspended until these conditions are fulfilled, as is clearly indicated by Order 34, Rule 6. This is manifest and beyond dispute. What reason is there for holding that the rule which we have quoted keeps in suspension only so much of the right to a personal decree as can, in the necessary conditions, be later exorcised under Order 34, Rule 6 and destroys the remainder of the right? In our view there is none. As it appears to us, the rule does not arbitrarily destroy any part of the right to a personal decree; the whole right remains; the rule merely suspends the whole right during, and because of, the existence of the remedy against the mortgaged property; and it follows that as soon as that remedy has been exhausted, or, without any blame attaching to the decree-holder, has ceased to exist or is discovered to have never existed, the obstacle to the granting of a personal decree is removed and the mortgagee is free to claim his whole right to an immediate personal decree and he can exercise it by an application in the suit for a personal decree.

10. Order 34, Rule 6 is in accordance with this rule and is merely an illustration of its working, and is only inserted, not because it gives some exceptional right, but to deal with the case of a deficiency, as the suitable complement of Rule 4(1) and Rule 5(2) which direct what is to be done with a surplus. It may be noted that the unqualified declaration of the decree-holder's right to the full amount of money (App. D, Form 5) further indicates that it is the whole right to a personal decree which is merely kept in suspension. This broad principle governs alike cases where there has been no sale and where there has been a sale leaving unsatisfied balance. Where the remedy against the mortgaged property under a sale decree is shown to be no remedy at all, e.g., by the discovery that mortgagor never had any title to any of the property or by the mortgagor losing

his title to the property, or for any other cause not due to the fault of the mortgagee, the reason for suspending the right to a personal decree has disappeared and the mortgagee can immediately, on the discovery, apply in the suit for a personal decree; not by calling in aid a legal fiction that there has been a sale and applying Order 34, Rule 6 (which in terms applies only where there has been a sale), but on the straightforward ground that the reason for keeping in suspension the right to a personal remedy has gone. Similarly, where the remedy against the property is exhausted by the sale of the whole of the property, or by so much of the property as remains available for sale and there remains a deficit a new right to a personal decree does not come into being, but the existing right ceases to be suspended, the objection to the exercise of such a right being now removed.

11. We may refer here to the forms given in the Civil Procedure Code. The plaint asks for a personal decree, "claims payment" (App. A. No. 45), and in default a decree for sale, etc. the decree does not give him a personal decree or any form of order for payment, but merely "declares the amount due" and gives an opportunity for payment. We should therefore concur in the view that has been held in such cases as *Ram Raghubir v. Imami Begam* [1911] 14 O.C. 217 *Sheodin v. Bhawani* [1911] 14 O.C. 62 and *Brijbehari v. Indarpal* [1920] 23 O.C. 145 that where the whole of the property has ceased to be available, for sale owing to no fault of the mortgagee, the mortgagee is entitled to a personal decree, though we do not hold that decree to be with one within Order 34, Rule 6, or even to be based by analogy with Order 34, Rule 6, on any legal fiction that there has been a sale but to a personal decree the whole right to which the mortgagee has had all along but which right has been merely suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or be otherwise unavailable.

12. In the present case the suit was filed on a date when the right to a personal decree was not yet barred; it was specifically asked for as the first relief in the plaint. Applying the principles above stated the mortgagee was entitled to apply in the suit for a personal decree as soon as it became known that his remedy by sale of the mortgaged property was exhausted, in this case by having become inevitably infructuous. But now the mortgagee in the present case is met with a real difficulty. He admittedly knew as long ago as the 15th December 1915, that the mortgaged property was not available to him; it was on that date that, in accordance with the view that we have expressed above, the obstacle to his applying in the suit for a personal decree was removed and on that date he became entitled to apply for an ordinary personal decree. The fact that he asks for a decree under Order 34, Rule 6, which we have held inapplicable, would not be adequate reason for refusing him an ordinary personal decree. But on 15th December 1915, he had all the knowledge of the facts upon the basis of which he now asks for a personal decree and could have proceeded immediately. His application is now clearly barred by limitation. The appeal is dismissed with costs.