

## **Mt. Sukra vs Ram Harakh And Anr. on 30 January, 1951**

**Equivalent citations: AIR1951ALL195, AIR 1951 ALLAHABAD 195**

**Author: Ghulam Hasan**

**Bench: Ghulam Hasan**

### **JUDGMENT**

Kidwai, J.

1. On 1-8-1928, some trees standing on a plot of land, described as a Tank, & house with trees, were mortgaged to Makhdoom to secure the repayment of a loan of Rs. 175. The mtgee. sued to enforce his mtge. & obtained a preliminary decree on 24-10-1934. This decree directed that, unless the entire sum due under the mtge. was paid by 24-4-1935, the mortgaged property (which is fully described in the Schedule) or a sufficient portion of it be sold. It further provided :

"(3) That if the net proceeds of the sale are insufficient to pay such amount & such subsequent interest & costs in full, the pltf shall be at liberty to apply for a personal decree for the amount of the Balance."

2. This decree was made final on 6-3-1938, & the first appln. for execution was made by the decree-holder on 10-12-1940. On 21-1-1941, this appln. was consigned to the records. A second appln. for execution was made on 11-3-1943. An objection was then taken on 16-4-1943, by the judgment-debtors that they were agriculturists & that accordingly the decree should be amended by reducing interest. This appln. was allowed & the decretal amount was reduced to Rs. 175. Thereafter the execution appln. was consigned to the records.

3. On 15-9-1944 a third appln. was made for execution of the decree. On 5-5-1944, the judgment-debtors objected that they were agriculturists & that by reason of the provisions of the U. P. Debt Redemption Act, the trees, which are scattered trees & not a grove, could not be sold & the house could not be sold because it was the residential house of an agriculturist used for agricultural purposes.

4. The Ct., after hearing arguments, allowed these objections. It held that Section 22, Debt Redemption Act, prohibited the sale of scattered trees & that Section 60, C. P. C., prohibited the sale of the house which. was admittedly the residential house of an agriculturist.

5. The decree-holder submitted to this order & applied on 14-7-1944 for a personal decree under Order 34, Rule 6, C. P. C. There were some defects in this appln. & since they were not removed by

the appct. who absented himself, the appln. was dismissed on 14-8-1944.

6. On 12-10-1944, a second appln. was made under Order 34, Rule 6, C. P. C. Office reported that this appln. was defective & it pointed out the defects, including the failure of the appcts. to file a copy of the decree. Eventually on 13-2-1945 a report was submitted that the appct. had not till then turned up to correct the mistakes.

7. On 23-2-1945, the decree-holder applied that he did not desire to proceed with the appln. & prayed that it might be returned to him for correction. It seems that the Ct. overlooked this appln. & ordered on 2-3-1945, "no personal decree can be granted, Rejected." Thereafter on 15-3-1945, it passed an order on the appln. for the withdrawal that the decree-holder should be informed that his appln. for a personal decree had already been dismissed.

8. On 12-9-1945, the decree-holder filed a third appln. under Order 34, Rule 6, C. P. C. It was pointed out that, on an objection by the judgment-debtor, it had been held that the trees were not saleable by reason of Section 22 of Act XIII [13] of 1940 & that the house could not be sold by reason of Section 60, C. P. C., that there was no other mortgaged property & that the judgment-debtor had a considerable amount of other property. It was accordingly prayed that a personal decree be passed.

9. While this appln. was still pending, the decree-holder made an appln. under Section 151, C. P. C., in which he stated all the facts & prayed that, even if Order 34, Rule 6, C. P. C., was inapplicable a personal decree be granted. After the filing of this appln., the appln. under Order 34, Rule 6, C. P. C., seems not to have been pursued further & it was allowed to remain without orders.

10. The learned Munsif held that since the decree-holder had not appealed against the order of 2-3-1945 on h:3 appln. under Order 34, Rule 6, C. P. C., & allowed an appeal to become time barred, he could not be allowed to avail himself of Section 151, C. P. C.

11. The decree-holder came up in revision under Section 115, C. P. C. Since there was some conflict of opinion between two decisions of the erstwhile Allahabad H. C. as to the power of the Ct. to pass a personal decree in a case such as this, the appln. has been referred to this F. B. for disposal.

12. On behalf of the appct. it was argued that the learned Munsif has erred in holding that the proper remedy of the appct. was to go up in appeal from the order dismissing his appln. under Order 34, Rule 6, C. P. C., since that rule is inapplicable & the appeal would not have led to any result; consequently the only course open to the appct. was to apply under Section 151, C. P. C., for the exercise of the inherent powers of the Gt. to give relief.

13. On the other hand, Mr. Bajpai contended that, although two F. B. decisions of the Chief Ct. of Oudh have taken the view that Order 34, Rule 6, C. P. C., does not apply to cases in which there has been no sale at all, yet other H. Cs. have taken the view that this rule applies even to oases where the mortgaged property has been destroyed or is otherwise not available. His argument proceeded that, since the rule is applicable & the application under it was dismissed, the order of dismissal became

final & consequently, even if an appln. lies under Section 151, C. P. C., the lower Ct. exercised its discretion properly in refusing to pass any decree under Rule 6. He has further contended that no appln. under Section 151 in fact lies.

14. An appln. under Order 34, Rule 6, C. P. C., is not an appln. in execution but an appln. for the passing of a decree. If it is refused the order passed is as much a decree & appealable as such, as an order granting a personal decree: vide *Madho Lal v. Duli Chand*, A. I. R. (20) 1933 ALL. 429 : (144 I. C. 468). This being so, Section 11, C. P. C., would bar a second appln. for a personal decree if the first appln. is dismissed.

15. In the present case the first appln. was defective & was dismissed for that reason. It was, therefore, not a properly presented appln. & it was rejected without any decision. The second appln. also had some defects but the Ct. considered it on its merits in spite of these defects & held that no personal decree could be granted. It, therefore, rejected the appln. This order of rejection amounted to a decree & the only way to correct it was by way of appeal.

16. It is true that Section 151, C. P. C., was not relied upon as providing a ground for relief in the case but that does not prevent the application of Section 11, C. P. C., since, by reason, of Explan. IV, of that section the bar of res judicata would apply even in respect of such matters as might & ought to have been made a ground of defence, or attack. In the present case the powers of the Ct. under Section 161, C. P. C., if it has any powers is a case such as the present, might & ought to have been invoked in claiming a personal decree. Section 11, C. P. C., would, therefore bar the present appln.

17. No doubt the decree-holder himself applied that he did not wish to proceed with his appln. for a personal decree & prayed that it might be returned. Even had the appln. been dismissed as withdrawn, it would not make any difference to the application of Section 11, C. P. C. Moreover, as a fact, this appln. was dismissed, it may be wrongly, on the merits & the proper method of getting this order corrected was by filing an appeal.

18. This is sufficient for a dismissal of the present appln., but the question of the maintainability of an appln. under Section 151, C. P. C., was fully argued before us & this was the point upon which the matter was referred to a Full Bench. I, therefore, proceed to express my opinion on this question also.

19. Section 151, C. P. C., gives extraordinary powers to a Ct. in order to prevent an abuse of the process of the Ct. it does not justify an order in violation of the law. The first thing, therefore, that has to be considered is whether there is anything against the law in granting a personal decree when no sale has taken place.

20. In *Bisheshwar Nath v. Chandu Lal* A.I.R. (15) 1928 ALL. 71 : (50 ALL. 821) a Bench of the Allahabad H. C. held that it would be doing violence to the language of Order 34, Rule 6, C P. C., to hold that it could apply where there had been no sale at all of any portion of the mortgaged property. Boys J. then proceeded to say:

"The mtgee can get a decree for sale & 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. Narayan, A. I. R. (5) 1918 P. C. 159 : (47 Cal. 370) 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 Cts. have evolved & declared this rule, for it would clearly be absurd to give the mtgor. the time allowed for payment under a decree for sale & at the same time allow the mtgee. to proceed instanter under a personal decree. What, then, happens to the mtgee'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 ?

It has always been understood & 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 those conditions are fulfilled, as is clearly indicated by Order 34, Rule 6. This is manifest & 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 exercised under Order 34, Rule 6 & 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, & because of the existence of the remedy against the mortgaged property, & 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 & the mtgee. is free to claim his whole right to an immediate personal decree & he can exercise it by an appln. in the suit for a personal decree."

21. Thus, according to this view in such cases the right to obtain a personal decree is merely in suspense.

22. This view has been expressly dissented from by another Bench of the same Ct. in Ram Saran Das v. Banwari Lal, A. I. R. (25) 1938 ALL. 98 : (I. L. R. (1938) ALL. 148). In his judgment in that case Niamatullah J. says:

"That a Ct. can pass a simple money decree, wholly apart from the provisions of Order 34, Rule 6, C. P. C. is a view which found favour with the learned Judges who decided Bisheshwar Nath v. Chandu Lal, 50 All. 821: (A. I. R. (15) 1928 All. 71) This Ct. has, however, repeatedly held that a simple money decree under Order 34, Rule 6, C. P. C., can be passed when & if the sale has taken place & the sale proceeds have proved insufficient for the satisfaction of the mtge. money. Order 34, Rule 6, empowers a Ct. to pass a simple money decree in a suit which has been previously concluded by a final decree. There is no other rule of law under which such a simple money decree can be passed. With great respect, we point out that a Ct. cannot pass a

decree on equitable grounds which the law does not expressly empower it to pass. Where a specific provision has been made by law prescribing the conditions in which a decree can be passed, the Ct. can act only within the limits laid down by such law. It is not justified in enlarging its powers by an appeal to equitable considerations. This Ct. has held in several cases that a simple money decree cannot be passed, unless the contingency contemplated by Order 34, Rule 6 has occurred, for instance, Behari Lal v. Bisheshwar Dayal, 9 A. L. J. 569 : (14 I. C. 591) observations in the F. B. case in Radha Krishna v. Tej Saroop, 1929 A. L. J. 1294 : (A. I. R. (17) 1930 All. 69 F. B.), Darbari Mal v. Mula Singh, 42 All. 519: (A. I. R. (7) 1920 All 165.) & Babu Lal v. Raghunandan, 1932 A. L. J. 311: (A. I. R. (19) 1932 All. 475). If a simple money decree can be passed wholly apart from Order 34, Rule 6, Civil P. C., its provisions are rendered absolutely nugatory. If we accept the correctness of the view taken in Bisheshwar Nath v. Chandu Lal, 50 All. 321 : (A. I. R. (15) 1928 All. 71) we feel that we will have to disregard the view taken in the cases noted above, in which the right of a mtgee. to obtain a simple money decree, without an attempt to sell the mortgaged property, was negatived. We think, therefore, that we are justified in not considering, Bisheshwar Nath v. Chandu Lal, 50 All. 321 : (A. I. R. (15) 1928 All. 71) as good law."

23. I respectfully agree with the reasoning of the learned Judges in the above case.

24. In Ganeshwar v. Harish Chandra, A. I. R. (27) 1940 Pat. 616 : (191 I. C. 599) the earlier Allahabad decision was preferred to the later one & in Roshan Din v. Thakur Das, A. I. R. (22) 1935 Lah. 536, the same view of the law was taken but in neither of these two cases was the reasoning such as to detract from the argument in Lal Ram Saran Das v. Lala Banwari Lal, A. I. R. (25) 1938 ALL. 98.

25. The right of a person who has lent money to another to realise the debt, is not an absolute right but is governed by the terms of the contract between them & by the law laid down for the enforcement of the debt, e. g., the law of limitation & the other laws of procedure. In the present case the loan was advanced on a mtge. by which certain property was hypothecated & it was provided that if that property was found insufficient for the realisation of the whole debt, the money lent could be realised from the person & other property of the debtor. The procedure laid down by the law for the enforcement of such a contract as this is that prescribed by Order 34, Civil P. C., & in fact that procedure was followed. According to that procedure, a personal decree can only be passed if the net proceeds of any sale held under Rule 5 of the Order are insufficient to pay the amount due to the pltf.

26. In the present case the preliminary decree itself lays down the same condition in the words which I have quoted at the commencement of this judgment, so that, apart from the provisions of Order 34, Rule 6, Civil P. C., the decree by which the relations of the parties are now governed stipulate for some sale of the mtge. property before a personal decree can be passed.

27. It is admitted by the appct's learned counsel that no sale has taken place & that consequently this condition has not been fulfilled so that Order 34, Rule 6, C. P. C., does not justify the grant of a

personal decree. He has to make this admission otherwise Order 34, Rule 6, C P. C., would be applicable & the Ct. having refused to pass a decree under that rule, a second appln. would be directly barred by Section 11, C. P. C. In any case, however, I see no reason to doubt the correctness of the decision in the Full Bench cases of Shyam Behari v. Mt. Mohandei, A. I. R. (17) 1930 Oudh 377 : (6 Luck. 202 F. B.) & Mahadeo Prasad v Jai Karan Singh, A. I. R. (20) 1933 Oudh 1: (8 Luck. 217 F. B.) which are in accordance with the whole trend of decisions of the erstwhile Allahabad H. C. as stated in Ram Saran Das v. Banwari Lal, A. I. R. (25) 1938 ALL. 98 : (I. L. R. (1938) ALL. 148) & as conceded in Bisheshwar Nath v. Chandu Lal, A. I. R. (15) 1928 ALL. 71 : (50 ALL. 321) itself.

28. Thus to grant a personal decree in a easel such as this would be to defeat not only the express provisions of Order 34, Rule 6, C. P. C., but of the decree itself, & Section 151, C. P. C., cannot be utilised in such a manner.

29. With all respect to the learned Judges who decided the case of Bisheshwar Nath v. Chandu Lal, A. I. R. (15) 1928 ALL. 71: (50 ALL. 321) it must be pointed out that, in the case of a mtgee., the mtgee. has no absolute right to obtain a decree for the mtge. money. Section 68, T. P. Act, provides :

"(1) The mtgee. has a right to sue for the mtge. money in the following cases & no others namely :

(a) where the mtgor. binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mtgor. or mtgee., the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of Section 66, & the mtgee has given the mtgor. a reasonable opportunity of providing further security enough to render the whole security sufficient, & the mtgor, has failed to do so ;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mtgor ;

(d) where the mtgee. being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession then of to him without disturbance by the mtgor. or any person claiming under a title superior to that of the mtgor :

Provided that, in the case referred to in Clause (a) a transferee from the mtgor. or from his legal representative shall not be liable to be sued for the mtge. money.

(2) Where a suit is brought under Clause (a) or Clause (b) or of Sub-section (1) the Ct. may, at its discretion, stay the suit & all the proceedings therein, notwithstanding any contract to the contrary, until the mtgee. has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mtgee. abandons his security, &, if necessary, re-transfers the mortgaged property."

This section restricts the right of the mtgee. to obtain a decree for money very greatly. In the present case the conditions laid down in any clause other than Clause 1 (a) do not exist. As to the conditions in Clause 1 (a) the mtgor. undertook a personal responsibility to repay the loan only if the mortgaged property was found insufficient for the purpose. The decree of the Ct. interpreted this as indicating that the property should be found on a sale taking place to be insufficient. Thus, this condition too does not exist.

30. Further Sub-section (2) of Section 68 makes clear that the remedy granted by this section is by way of suit even when proceedings are still going on for the realisation of the mtge. debt out of the proceeds of the mortgaged property. This indicates that if the situation contemplated by Section 68, T. P. Act, has arisen, it is not by means of a proceeding under Section 151, C.P.C., in the suit; on the mtge. that the remedy can be claimed but by means of a separate suit.

31. I have come to the conclusion, therefore, that no appln. lies under Section 151, C. P. C., for the grant of a personal decree on the basis of a mtge. & that a personal decree can only be granted if the conditions laid down in Order 34, Rule 6, C. P. C., are satisfied. For this reason too the appln. must fail & I would dismiss it with costs.

Ghulam Hasan J.

32. I agree.

Chandiramani J.

33. I agree.