

Rajani Kanta Dhara Vs Manmatha Nath Das and Another

Court: Calcutta High Court

Date of Decision: Dec. 22, 1943

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€” Section 230, 246

Citation: AIR 1945 Cal 1

Hon'ble Judges: Roxburgh, J; B.K. Mukherjea, J

Bench: Full Bench

Judgement

Roxburgh, J.

The appellant, Rajani Kanta Dhara, has obtained a mortgage decree for sale for a sum which now amounts to about Rs.

5000 against defendants 2 and 3 in Title Suit No. 15 of 1933 in the Court of the First Subordinate Judge, Howrah; while defendants 2 and 3 in

turn have been awarded by the same decree costs amounting to about Rs. 1400 against the plaintiff. The appellant has no personal remedy against

the defendants in respect of the amount decreed in his favour. Defendants 2 and 3 have sought to execute their decree for costs in Title Execution

case No. 27 of 1941 of the same Court, and the appellant has claimed a set-off of the amount due by him for costs against the amount due to him

on the mortgage decree; he relies on the provisions of Rules 19 and 20 of Order 21, Civil P. C. The appellant's claim for set-off has been refused

by the trial Court, hence this appeal.

2. When asked why his clients object to the set-off, Mr. Das on behalf of the respondents, states that the property will probably not fetch more

than Rs. 1700 on a sale. If this is correct then if set-off is allowed defendants 2 and 3 will in fact get nothing out of their decree for costs. If,

however, the property is worth on a sale Rs. 5000 the amount of the appellant's decree, or more, then it is financially immaterial to the parties

whether set-off is allowed or not. If the property is worth less than Rs. 5000 the appellant's net receipts will be diminished to the extent of the

shortage, if no set-off is allowed, while those of the respondents will be diminished by a similar amount if set-off is allowed, vanishing to nothing if

the property fetches on sale Rupees 3600 or less.

3. On behalf of the appellant reliance is placed on a series of cases, mostly of the Madras Court in which it has been held that a set-off may be

made even in cases where there is no personal liability to pay the decretal amount, and in some of which stress is laid on the terms of Order 21,

Rule 20 of the Code, which make the provisions of Rules 18 and 19 of the same Order applicable to "decrees for sale in enforcement of a

mortgage or charge." In cases in which set-off has been held to be not permissible either no reference is made to the terms of Rule 20 at all, or else

it has been held that Rule 20 does not literally apply the provisions of Rules. 18 and 19 to all mortgage decrees for sale, but only to such as can be

brought within the terms of those rules, and it is held that decrees where there is no personal liability to pay are either (1) not decrees "for the

payment of" sums of money (Rule. 18) or (2) not decrees under which the decree-holder who can bring about the sale is, "entitled to recover" a

sum of money from the defendant, (Rule 19) or (3) that the respective parties do not "fill the same character" (Rule 18(3) (a)). In *Hazari Bam v.*

Bansidhar ("37) 24 A. I. R. 1937 P. C. 39 which was an appeal before the Judicial Committee from the judgment in *Garib Mian Thikadar Vs.*

Mohammad Habibul Rahman, , Sir George Rankin stated

it is true that under Rules 18 to 20 the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge

from the circumstance that both decrees arise out of the same transaction. Whatever they may arise from, circuity of proceedings thereunder can

be avoided and should be avoided--this is the principle of the rules.

The main question for decision was whether a mortgage decree for sale could be set-off against the decree for costs, that is to say, one under Rule

18 read with Rule 20. The judgment showed that the right of respondents 1-16 in the mortgage suit before the Judicial Committee to a personal

judgment subsisted. The principal argument before the Court was that Rule 20 only applies where both decrees are mortgage decrees. This was

not accepted. The question whether there could be a set-off in cases where there was no personal liability under the mortgage decree was not

discussed, but their Lordships remarked that

they would be slow to give effect to a rule of set-off so as to alter substantive rights or to produce consequences, beyond the scope of an intention

to avoid circuity of proceedings.

It was stated that the observations of Noor J. in the judgment under appeal and his discussion of the authorities (*Nagar Mal v. Ram Chand* ("11)

33 All. 240, *Sheo Shankar and Others Vs. Chunni Lal and Others*, , *Burma Oil Co., Ltd. v. Ma Tin* ("30) 17 A. I. R. 1930 Rang. 68 and

Venkata Reddi Vs. T.V. Dorasami Pillai,) would afford assistance to the Board and the Courts in India when the matter arose for decision.

Before referring to the above cases, we may first discuss cases in which it has been clearly held that a set-off is allowable even where there is no

personal liability on the part of one party. These are Shankara Menon v. Gopala Pattar (1900) 23 Mad. 121 and Nagar Damodar v. Gange ("38)

25 A. I. R. 1938 Mad. 638. The latter relies on the former, and each cites Bhagwan Singh v. Ratan ("94) 16 All. 395 in support of the view taken.

We may discuss this case first as it seems to have been misunderstood in the later cases; incidentally it may be noted that it was a case before

1908 when Order 21, Rule 20 was first enacted. In this Allahabad case there was a decree u/s 92 of Act 4 of 1882 for redemption, and

foreclosure in default. The mortgage money plus costs of Rs. 31-1-6 amounted to Rs. 1004-7-0. The plaintiff was awarded Rs. 6-10-0 costs. The

plaintiff within time deposited Rupees 1003-11-6, or- 0-11-6 short of the decretal amount. The mortgagee ""being of the mind of Shylock of old"",

as the learned Judges remark, sought to foreclose as the decretal amount had not been deposited. The Court expressed disagreement with the

view taken in Kalka Prasad v. Earn Din ("83) 5 All. 272 relied on by the mortgagor, and allowed the set-off. It would appear that the case was

not really one u/s 247 at all. It is certainly not one that would be covered by Rule 20 as there was no decree for sale in default. The mortgagee, in

execution, was applying for foreclosure. The mortgagor never applied for execution, he was exercising his option to deposit the decretal amount

when he made that deposit. At best it would seem that the case was one where by analogy to Section 247 the doctrine of equitable set-off might

have been applied as was done in Ishri v. Gopal Saran ("84) 6 All. 351 which we will have occasion to refer to below. The learned Judges felt the

difficulty and appear to have relied on the point that the costs of Rs. 31-6-0 awarded to the defendant were ""recoverable"" from the plaintiff, since

they noted that there would have been a difficulty in the absence of such an award, as there was nothing recoverable from the plaintiff, the decree

being one for foreclosure in default. Thus the set-off was explicitly allowed on the basis that there was a personal remedy on the side of the

defendant. Though the Court expressed disagreement with the view in Kalka Prasad v. Earn Din ("83) 5 All. 272, it does not appear to have been

necessary for them to do so. In that case there was a decree for sale and it had been expressly held that there was no personal liability, the

defendant's claim to set off costs was refused.

3. In Shankara Menon v. Gopala Pattar (1900) 23 Mad. 121 there was a decree in favour, of the mortgagor for redemption and for sale in

default, there was no personal liability; the mortgagor was awarded costs, and sought to arrest the mortgagee in execution. The lower Court had

relied on *Kalka Prasad v. Earn Din* ("83) 5 All. 272 and had refused set-off. The High Court remarked that the decision by Straight J. in this case

was inconsistent with the decision in *Ishri v. Gopal Saran* ("84) 6 All. 351, already referred to above, and relying on *Bhagwan Singh v. Ratan*

("94) 16 All. 395, allowed set-off. We, can, with respect, find no inconsistency between the two Allahabad cases mentioned. In *Ishri v. Gopal*

Saran ("84) 6 All. 351 there was a decree for pre-emption u/s 214 of the then Code. The pre-emptor was granted costs, and deposited an

amount that was less than the decretal amount, though in excess if set-off for his own costs were allowed. He subsequently applied for delivery of

possession and for recovery of the balance of his costs. The doctrine of equitable set-off was applied by analogy of Sections 221 and 247 of the

Code, the judgment pointing out that the sections had no direct application, saying with regard to the latter section that

it would be stretching the language of that section to an unjustifiable extent to hold that the purchase money which a pre-emptor decree-holder has

to deposit as a condition precedent to obtaining possession under his decree is a sum which the vendor (or vendee) judgment-debtors "are entitled

under the same decree to recover" or for which they could, in any case, "take out execution".

4. In passing it may be remarked that whatever view be taken as to the propriety in a decree for sale where there is no personal liability in allowing

a set-off of costs, there can be inequity if the mortgagor chooses to deposit the decretal amount minus his dues for costs. Such a set-off is,

however, not provided in the Code, though it would certainly avoid circuity of proceedings. In *Nagar Damodar v. Gange* ("38) 25 A. I. R. 1938

Mad 638 : 177 I. C. 464, there was a decree for sale in default of payment of rent; costs were awarded to the defendant, and the plaintiff sought

to arrest the defendant in execution. The trial Court refused set-off as there was no personal decree against the defendants. The High Court

allowed set-off referring to the earlier cases discussed above, and also to *Chinnammal v. Chidambara Kothanar* ("36) 23 A. I. R. 1936 Mad. 626,

a case of a decree for specific performance where costs were awarded to the plaintiff. The learned Judges also refer to the judgment in *Hazari*

Bam v. Bansidhar ("37) 24 A. I. R. 1937 P. C. 39 for its view that Rule 20 cannot be restricted to its effect to decrees under Order 34, Rule 6

and note that they follow the principle in *Shankara Menon v. Gopala Pattar* (1900) 23 Mad. 121. In the last paragraph of the judgment they state:

It is not necessary to express any opinion having regard to the plain language of Order 21, Rule 20, as to how far the decision in *Venkata Reddi v.*

Dorasami Pillai ("33) 20 A. I. R. 1933 Mad. 63 is correct in that it holds that a mortgage decree cannot be set off against a money decree in the

absence of a personal liability on the part of the mortgagor who holds the money decree.

Nevertheless the case in Venkata Reddi v. Dorasami Pillai ("33) 20 A. I. R. 1933 Mad. 63 was one cited by the Judicial Committee in Hazari

Bam v. Bansidhar ("37) 24 A. I. R. 1937 P. C. 39 in addition to those referred to by Noor J. in the judgment under appeal before them, as

meriting consideration when the question actually decided in Nagar Damodar v. Gange ("38) 25 A. I. R. 1938 Mad. 638 : 177 I. C. 464, arose

for decision and the Judicial Committee's judgment had just previously been quoted in another connexion.

5. We may now turn to the cases referred to in Hazari Bam v. Bansidhar ("37) 24 A. I. R. 1937 P. C. 39 . They are all cases of cross-decrees

governed by Rules 18 and 20 of Order 21. In Nagar Mal v. Ram Chand ("11) 33 All. 240, Nagar Mal held a money decree for a small sum,

while Earn Chand held a decree for enforcement of a charge by sale for a larger sum. The former applied for execution, and the Court set off the

two decrees against each other. The argument in appeal was that Rule 20 only applied where both decrees were mortgage decrees. It does not

appear whether there was personal liability or not. It would seem that there must have been such liability, since the High Court stated that it had not

been pointed out that any one would be prejudiced by a set-off of a decree of the kind contemplated under Rules 18 and 19. Set-off was

accordingly allowed. The case is referred to by Noor J. in Garib Mian Thikadar Vs. Mohammad Habibul Rahman, ; it helped to dispose of the

similar contention raised there as to the limitation of the effect of Rule 20 to two mortgage decrees; there is no discussion of it as a case where set-

off was allowed. Sheo Shankar and Others Vs. Chunni Lal and Others, is a case where the question arose of set-off of a mortgage decree

foreclosing a right to redeem from sale property in which Sheo Shankar had purchased a small share, against a personal decree held by him; it was

a case therefore under Rules 18 and 20 and as stated in the judgment, its decision depended upon their interpretation. Sundar Lal J., commented:

Prior to the passing of Act 5 of 1908, the present code of Civil Procedure, it had been held that a decree for sale is not a decree for payment of

money within the meaning of Sections 230 and 246, Civil P. C. This point has been cleared by Rule 20 of this Order. The provisions of Rules 18

and 19 apply now to decrees for sale as well. Rule 20, however, does nothing more than make the provisions contained in Rules 18 and 19

applicable to decrees for sale. The two decrees proposed to be set off must come within the provisions of the rules before they can be so set off.

The learned Judge then proceeded to point out the "special nature of the decree so far as it affected the purchaser of a share in the equity of

redemption, and the effect if a set-off is allowed, namely that he is in fact

compelled to pay a debt, which he is not personally bound to pay and for the payment of which he is under no personal obligation. He is

compelled to save from sale property which he does not care to save and which he is not bound to save from sale.

6. "In my opinion," the learned Judge continues,

a person against whom a decree foreclosing his right to redeem a property from sale is passed in his character as a puisne mortgagee or an

attaching creditor, is a judgment-debtor to that decree in a character different from the one in which he holds a decree made in his favour

personally and which is enforceable against his judgment-debtor by the arrest of his person and the attachment of his property.

Set-off was accordingly refused explicitly on the basis that Sheo Shankar, as purchaser, came within the exception in Sub-rule 3(a) of Rule 18.

Reference was made to the case in *Nagar Mal v. Ram Chand* ("11) 33 All. 240 discussed above, and it was distinguished solely on the ground

that the judgment-debtors in that case in the decree for sale were not impleaded in that suit in a different capacity from that in which they had

obtained their decree for money. It seems to have been assumed that even if in that case there had been no personal liability in respect of the

mortgage decree, (which, as has been noted above seems not to have been the case) the decision allowing set-off would have been correct.

Burma Oil Co., Ltd. v. Ma Tin ("30) 17 A. I. R. 1930 Rang. 68 is an instance where set-off was refused of a mortgage decree for sale where

there was no personal liability against a money decree. This case is referred to in *Venkata Reddi v. Dorasami Pillai* ("33) 20 A. I. R. 1933 Mad.

63, where it is said that it is not clear whether there was personal liability on the mortgage decree; but this observation seems to be incorrect. The

judgment shows that the lower Court had refused set-off on this very ground, and later in discussing *Sheo Shankar and Others Vs. Chunni Lal and*

Others, and in rejecting the argument that where there is no personal liability on the mortgage decree the parties do not fill the same character, it is

pointed out by Heald J. that the case before him, and *Sheo Shankar and Others Vs. Chunni Lal and Others*, had the common feature that there

was no personal liability under the mortgage decree. Referring to *Nagar Mal v. Ram Chand* ("11) 33 All. 240, Heald J. remarked that it was not

clear whether there was personal liability in that case, but if there was, then the case was no guide for the decision of the case before him. The

basis of the decision of Heald J. was the view that a mortgage decree for sale where there is no personal liability is not a decree ""for the payment

of sums of money"". The learned Judge remarks:

It may be noted that ordinarily a mortgage decree for sale is a decree for the payment of a sum of money. In the form of a preliminary mortgage

decree for sale which is given as Form No. 4, of Appendix D to the Code it is provided that if the net proceeds of the sale are insufficient to pay

the mortgage debt with interest and costs the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance, and Rule 6 of

Order 34 says that where the net proceeds of the sale of the mortgaged property are found to be insufficient to pay the amount of the mortgage

debt the Court may pass a decree for the balance if such balance is legally recoverable otherwise than out of the property sold. If the balance is not

so recoverable, the decree is not an ordinary decree for sale in enforcement of a mortgage, and since in my opinion it cannot be regarded as a

decree for the payment of a sum of money I would hold that Rule 18 cannot be applied to it.

Thus the learned Judge arrived at the same result as was reached in Sheo Shankar and Others Vs. Chunni Lal and Others, , but that case rules out

the very reason on which he bases his decision, and takes the view that Rule 20 was enacted to remove the objection that a mortgage decree for

sale was not a decree for the payment of a sum of money, while Heald J. in turn rules out the reason on which the decision in Sheo Shankar and

Others Vs. Chunni Lal and Others, is based, namely that the parties fill different characters. Venkata Reddi Vs. T.V. Dorasami Pillai, was a case

where set-off was allowed of a mortgage decree for sale with personal liability against a money decree. In the judgment the provisions of Rule 20

are quoted and it is stated that

This shows that the mere fact that the decrees in which the set-off is sought are mortgage decrees, or one of the two decrees is a mortgage decree,

doss not by itself amount to an objection to the set-off claimed.

Reference was made to Nagar Mal v. Ram Chand ("11) 33 All. 240, and the discussion thereof in Sheo Shankar and Others Vs. Chunni Lal and

Others, and. the view that where there is no personal liability the parties do not fill the same character is approved. Referring to Burma Oil Co.,

Ltd. v. Ma Tin ("30) 17 A. I. R. 1930 Rang. 68 it is noted (erroneously, as pointed out above) that it is not clear whether there was personal

liability in that case, saying

in that case the decree at the time the question arose was only against the property and the decree provided for liberty to apply for a personal

decree for the amount of the balance, and one does not know how the application may end.

The special argument of Heald J. in that case does not appear to have been appreciated. It is concluded that in the case in suit there could be no

objection to the set-off. Garib Mian Thikadar Vs. Mohammad Habibul Rahman, , as already noted above, was a case where set-off was allowed

of a mortgage decree for sale with personal liability against a money decree. Noor J. however in discussing Burma Oil Co., Ltd. v. Ma Tin ("30)

17 A. I. R. 1930 Rang. 68, stated that he agreed with the view expressed therein if it meant that Rule 20 applied only in cases where there was a

personal remedy, but not if it meant that Rule 20 only applied where there was an actual decree under Order 34, Rule 6 for the payment of money.

In our opinion Heald J. never had any intention of expressing this latter view. He referred to the matter in the extract quoted above in developing an

argument that a decree for sale in a mortgage suit where there was no personal liability was not a decree for the payment of money.

7. So far as concerns the cases discussed above in which set-off has been allowed even where there was no personal liability, viz., Shankara

Menon v. Gopala Pattar (1900) 23 Mad. 121 and Nagar Damodar v. Gange ("38) 25 A. I. R. 1938 Mad. 638 , for the reasons indicated above,

we respectfully are of opinion that they do not give a sound basis for the view. On the other hand the chief cases in which the opposite view has

been held viz., Sheo Shankar and Others Vs. Chunni Lal and Others, and Burma Oil Co., Ltd. v. Ma Tin ("30) 17 A. I. R. 1930 Rang. 68 are

themselves self contradictory in their reasons. The case in Burma Oil Co., Ltd. v. Ma Tin ("30) 17 A. I. R. 1930 Rang. 68 appears to have been

misunderstood in the later cases which discuss it (Venkata Reddi Vs. T.V. Dorasami Pillai, and Garib Mian Thikadar Vs. Mohammad Habibul

Rahman,). That it may be inequitable in certain circumstances to allow set-off where there is no personal liability under the mortgage decree is

obvious. The question is whether the inequity is inherent in Rule 20 and whether it is unavoidable or not. The two cases which attempt to show that

it is avoidable contradict each other. Both, it may be noted, relate to cross-decrees, under Rule 18. The case before us is one where the set-off is

claimed in respect of amounts recoverable under the same decree, a case under Rule 19. The argument that the parties do not occupy the "same

character"" is more difficult of application under Rule 19 than under Rule 18. The ordinary application of the exception in Sub-rule 3(a) of Rule 18

preventing set-off of, for example, claims by an administrator against claims against him personally, could hardly arise under Rule 19. Of all the

cases considered the only one in which set-off, has been refused for claims arising under the same mortgage decree where there was no personal

liability under the mortgage decree is *Kalka Prasad v. Earn Din* ("83) 5 All. 272, a case of 1883, before the enactment of Rule 20. The reason

there given was that the parties u/s 247 did not have the same" character, or identical rights, an argument we find difficult to accept in a case under

Rule 19 after the enactment of Rule 20. Again the argument in *Burma Oil Co., Ltd. v. Ma Tin* ("30) 17 A. I. R. 1930 Rang. 68 is specifically

based on the wording of Rule 18, and does not apply equally to the wording of Rule 19. In view of the wording of Order 34, Rule 6 and Rule 8A

if the balance is legally recoverable from the defendant otherwise than out of the property sold"" it would seem that the scheme of the Code as

regards mortgage decrees for sale is always that whatever money is recovered ""from the defendant,"" it is recovered either (a) by his depositing it,

(b) by selling property in which he has an interest, and (c) in cases where this is allowable, from him personally. ""Where there is no personal liability

the-amount recoverable is limited, if the defendant does not deposit it, to the amount fetched by sale, but it is as much recovered from the

defendant as money is recovered from him in ordinary execution of a money decree; the limit there is merely how much property the decree-holder

can trace out and levy execution against. It seems to us that whatever Rule 20 was intended to correct or settle, its effect has been to remove any

chance of contending that Rule 19 (and it would seem also, Rule 18) will not apply in a case of a mortgage decree for sale, whether there is

personal liability or not. The result is no doubt that the cure has introduced another malady, but the Court in its judicial capacity cannot remedy the

new ill. It has a legislative power u/s 122 of the Code under which it can put right the mistake made in Rule 20. We may note that this Court has by

the introduction of Sub-rule (3) to Order 34, Rule 4 given Courts discretion to direct in a decree for sale that if the proceeds are not sufficient to

pay the mortgage debt, the mortgagor shall pay the balance personally, and that so far as this Court is concerned this would in any case affect the

argument developed by Heald J. in *Burma Oil Co., Ltd. v. Ma Tin* ("30) 17 A. I. R. 1930 Rang. 68

8. The appellant therefore must succeed in his claim for set-off; this appeal is allowed, and the order of the trial Court is reversed. The

respondents, being entitled to recover the smaller sum under the decree cannot take out execution, and their application is accordingly dismissed.

The appellant may take out execution for so much as remains after deducting the sum due by him, and on his doing so satisfaction will be entered

upon the decree for the smaller sum in accordance with the terms of Order 21, Rule 19(c). No order is necessary in the rule and the application.

B.K. Mukherjea, J.

9. I agree, and desire to add a few words. The case before us is undoubtedly governed by Order 21, Rule 19, Civil P. C, read with Rule 20 of the

same Order and the whole controversy centres round the point as to whether the two parties are entitled to recover sums of money from each

other under the same decree. The contention put forward by Mr. Das on behalf of the defendants-respondents is that they being transferees of the

mortgaged property were not personally liable under the mortgage decree and it could not be said therefore that the appellant was entitled to

recover any sum of money from them. On the other hand the decree for costs which they obtained against the appellant was executable against the

latter personally, and this being the position the provision of Order 21, Rule 19, Civil P.C., was not attracted to the facts of the present case. It is

said that although the mortgagee decree-holder could execute his decree only against the mortgaged property and was not entitled to recover

money personally from defendants 2 and 3, to allow him a set-off would be to make the defendants personally liable for a portion at least of the

mortgage money. The value of the mortgaged property, says Mr. Das, is considerably below five thousand rupees, and it would be manifestly

inequitable if the decree-holder is allowed to set off the costs payable by him against the mortgage decree. Now the right to set off as embodied in

Order 21, Rule 19, Civil P. C, is one created by law and the Court is bound to give effect to the plea, provided the conditions prescribed by the

rule are fulfilled, and no consideration of equity would ordinarily arise. Order 21, Rule 20 expressly lays down that the provisions contained in

Rules 18 and 19 shall apply to a decree for sale in enforcement of a mortgage or charge. Thus, if the plaintiff in a mortgage suit gets a decree for

sale by which he can recover money from the judgment-debtor, and the latter is awarded costs against the plaintiff by the same decree, the costs

can certainly be set off against the mortgage decree under Order 21, Rule 19 read with Rule 20. The question is whether the operation of the rule

is confined only to cases where the judgment-debtor is personally liable for the mortgage money.

10. The Rangoon High Court in *Burma Oil Co., Ltd. v. Ma Tin* ("30) 17 A. I. R. 1930 Rang. 68 held that when under the mortgage decree the

judgment-debtor is not personally liable to pay any sum of money and the decree-holder has no remedy except as against the property mortgaged

the latter cannot claim to set off against the amount due to him in respect of the mortgage decree, the costs due by him under a simple money

decree, to the other party. This was a case under Order 21, Rule 18 and not Rule 19, Civil P. C. In a similar case, the Patna High Court held that

it is not necessary that the mortgage decree should be actually for payment of any money personally by judgment-debtor, it was enough if the

personal remedy was legally available against him, *Garib Mian Thikadar Vs. Mohammad Habibul Rahman*, . This decision was affirmed on appeal

by the Privy Council: vide *Hazari Bam v. Bansidhar* ("37) 24 A. I. R. 1937 P. C. 39. Before the Judicial Committee the learned counsel for the

respondent contested the view taken in the High Court as to personal liability being a condition of set off, but their Lordships expressly left the

question open though it was said that when such question would arise for decision, the judgment of Noor J. as well as the authorities cited by him

in the judgment might be of considerable assistance to the Court. The point therefore still remains to be finally settled. On the other hand, there is a

series of decisions by several High Courts in India where it has been held that under Order 21, Rule 19, Civil P. C., or the corresponding Section

(247) of the old Code, it is not necessary that the remedy of each party against the other should be precisely of the same nature. All that the rule

requires is that two parties must be entitled to recover sums of money from each other. The decree need not necessarily be one directing B to pay

personally a sum of money to A. It would be a decree for recovery of money even if the money is realisable only by a sale of a hypothecated

property and not from the person of the judgment-debtor: vide *Bhagwan Singh v. Ratan* ("94) 16 All. 395; *Shankara Menon v. Gopala Pattar*

(1900) 23 Mad. 121, *Sadik Husain v. Hashim Ali* ("14) 1 A. I. R. 1914 Oudh 416 and *Nagor Damodar Shanbhogue* (died) and *Others Vs.*

Gange and Others,

11. A preliminary decree for sale in a mortgage suit always directs the defendant to pay a certain sum of money to the plaintiff within a certain time,

and in default of the payment within the time specified the final decree directing sale of the property is made: vide Forms 5, 5(A) & 6, Appendix

D., Civil P. C. No distinction is made between a defendant who is the original mortgagor or his heir, and one who is a mere transferee of the equity

of redemption and no investigation is permissible at this stage as to whether any defendant is personally liable for the mortgage money or not. In

these circumstances it is difficult for, us not to take the words of Order 21, Rule 19, in their natural sense or to read into Order 21, Rule 20 certain

words which are not there, and"" we feel constrained to hold that a set-off under that rule has to be allowed, even if one of the parties is not

personally liable under the mortgage decree. The result indeed might produce hardship in certain cases, and if Mr. Das"s estimate of the value of

the mortgaged property is correct, the present case is undoubtedly one of that type. But the defect can only be removed by the Legislature or by

this Court under its rule-making authority. The appeal should be allowed. We direct each party to bear his cost in both Courts.