

(1938) 08 PAT CK 0018
In the Patna High Court

Banarsi Prasad and Others

APPELLANT

Vs

Mahabir Prasad Sahu and Others

RESPONDENT

Date of Decision : 04-08-1938

Acts Referred:

Citation : AIR 1939 Patna 41

Hon'ble Judges : Wort, Acting C.J.;Manohar Lall, J;Manohar Lal, J

Bench : Full Bench

Judgement

Wort, Ag. C.J.

1. It is not disputed in this appeal that the appellant is liable personally for the costs of the Appellate Court a small sum amounting to somewhere between Rs. 50 and Rs. 60. The method by which it should be realized is a matter for the parties themselves and is no concern of this Court. As regards the costs of the first Court, it seems to me that the matter is perfectly clear.

2. Mr. Bose on behalf of the respondents contends that he has a right to recover the costs against defendants second party who are represented by the appellants in this Court. I do not think there can be any doubt that whether he is so entitled or not depends upon the construction to be placed upon the decree of the trial Court. Heald J. in Maung Po Mya v. M.A.S. Firm A.I.R (1931) Ran 153 lays down certain rules which, the learned Judge was of the opinion, should be used by the Courts to guide them in the question of the construction of a decree. So far as the rules are concerned, (if I may say so with respect to the learned Judge), I agree, but the purpose for which they should be used seems to me to be an entirely different matter. Having regard to what the learned Judge says, it does seem that in making the order in the suit the Court, all things being equal, should consider the advisability of making a personal decree against the party in such a case as the present.

3. But it depends, as I have already stated, entirely upon the circumstances of each case. The order of the Court in this case seems to me to be capable of

construction in one way only and that is that it is an ordinary mortgage decree. The order is in the following form:

That the suit be decreed with costs on contest against defendants 3 to 9 and ex parte against others.

4. When the order provides "the suit be decreed with costs" it obviously means that the claim in the suit be decreed with costs". In my judgment, the decree in the form which I have stated this to be is not a personal decree against the defendants second party (defendants 3 to 9). Now if there were any serious doubt about the matter, it may be decided in this way. The Court makes no difference between the amount of the claim and the costs. It has been decided in numerous cases. I only propose to quote one, being the case in *Jamna Das v. Ram Autar Pande* (1912) 34 All. 63 that the subsequent purchaser, there being no privity between him and the mortgagee, is not liable in the action on the personal covenant. Now having regard to that proposition, it could not be said in this case that the Judge was intending that the subsequent purchaser (the appellant before us) should be liable for the amount of the mortgage moneys, and not differentiating between the amount of mortgage moneys and the costs, it is equally clear that he did not intend a personal decree against defendants second party for costs. In my judgment the decision of the learned Judge on this question is erroneous.

5. The learned Judges in the Courts below appear also to have had held against the appellant on the footing that the matter was *res judicata*. There were no sufficient materials (so it appears) before the Courts to enable them to come to that decision; there are certainly no sufficient materials before this Court. One of defendants 3 to 9 objected to her property being sold in execution of the decree for costs. The objection was overruled. So far as that defendant is concerned, of course, it is impossible for her now to put forward the contention advanced by the appellant before us. But it is far from saying that the other defendants are precluded from raising the objection. There is nothing to show that the properties of the other defendants were attached and put up for sale and unless some relief in that form as asked for by the decree-holder against the defendants before us at the moment, it could not be said that the decision in *Ram Kuari's* case was *res judicata*.

6. For those reasons, in my opinion, the decision of the learned Judge in the Court, below was wrong and it must be set aside and the appeal allowed with costs of this Court subject, of course, to the liability which I have already stated to exist in the defendants for the payment of the costs of the Court of Appeal. For the purposes of costs the appeal will be valued at Rs. 200.

Manohar Lall J.

I agree.