

(1942) 08 AHC CK 0018
In the Allahabad High Court
Case No : First Appeal No. 369 of 1938

Brij Jiwandas and others

APPELLANT

Vs

Srimati Kawal Mani Bibi and another

RESPONDENT

Date of Decision : 03-08-1942

Acts Referred:

Agriculturists Relief Act — Section 2(2)

Citation : (1942) 08 AHC CK 0018

Hon'ble Judges : Verma, J;Allsop, J

Bench : Division Bench

Advocate : Gopi Nath Kunzrus, for the Appellant; Govind Das for Respondents, for the Respondent

Final Decision : Dismissed

Judgement

Allsop and Verma, JJ.—This appeal arises out of a suit for the sale of certain property on the basis of a simple mortgage executed by Brij Jiwan Das, the Appellant, on the 2nd of August, 1935, to secure a debt of Rs. 5,000. The mortgage was in favour of the Plaintiffs-Respondents. The defence taken to the suit by the two sons of Brij Jiwan Das was that the mortgage was not for legal necessity and that no decree for sale could be passed on the basis of it. Brij Jiwan Das himself raised the plea that he was an agriculturist and that the provisions of the Agriculturists' Relief Act applied to his case. This plea of his was over-ruled by the Court below upon the ground that he was assessed to income tax in the year 1935, when he executed the deed of mortgage. It is upon this point that Brij Jiwan Das and his sons have appealed. Their contention is that Brij Jiwan Das was an agriculturist because, although he was assessed to the payment of income tax in the year 1935-1936, that assessment was made on the income of the year 1934-1935 and that the question whether he was or was not an agriculturist should not depend upon payment of income tax in the year of assessment but on the receipt of income in the year upon which the assessment was based. In our judgment, there is no justification for this argument. The rule

in the Agriculturists' Relief Act, Section 2(2), is that no person shall be deemed to be an agriculturist if he is assessed to income tax with certain provisos with which we are not here concerned. There can be no doubt that Brij Jiwan Das was assessed to income tax for the year in which he executed the deed of mortgage and there is nothing in the Act which suggests that it is necessary to go into the question upon what basis that assessment was made. In our judgment there is no force in the appeal and we must dismissed it

2. On the other hand, there is a cross-objection by the Respondents in which they have raised two points. One is that the learned Judge of the Court below was not justified in disallowing interest for the period between the institution of the suit and the date of the decree and that he should have allowed interest at the contractual rate up to the date which has fixed for payment under the provisions of Order 34 Rule 4. It seems to us that the learned Judge of the lower Court must have been guilty of a mere slip when he directed that interest would be levied at the contractual rate up to the date of the institution of the suit, because he has suggested no reason at all why interest should not be allowed pendente lite. Under the provisions of Order 34, Rule 11 and Order 34, Rule 4, interest should ordinarily be allowed at the contractual rate on the principal amount due, in the first place up to the date of the decree and in the second place from the date of the decree to the date fixed for payment under the provisions of Rule 4. It is possible that in some circumstances for good reasons a Judge may disallow interest altogether, but it seems to us, if he does allow interest, he must under the provisions of Order 34, Rule 11(1) allow it on the principal amount at the contractual rate, if there is such a rate. The learned Judge of the Court below has not given any reason why he has not acted in accordance with those provisions and as we have already stated, we think that he merely made a slip. We therefore propose to pass a decree modifying his decree in this respect.

3. The second point raised in the cross-objection is on the subject of legal necessity. The learned Judge or the Court below held that the mortgage was binding only to the extent of Rs. 1,016-12 which was paid to a certain Bhagwan Das in satisfaction of an antecedent debt due from Brij Jiwan Das and for the rest of the amount due the property was not liable but that Brij Jiwan Das was personally liable to pay. It is argued in support of the cross-objection upon this point that the evidence was sufficient in the circumstances justify the conclusion that the whole amount was borrowed by Brij Jiwan Das for legal necessity. It is pointed out that neither of his sons had been born at the date when the mortgage was executed, although one of them was then in his mother's womb. It is admitted that this son had a vested right from the date of conception and therefore that the question of legal necessity did arise, but the suggestion is that the mortgagees could not know that there was any likelihood of the transfer being challenged by any son of Brij Jiwan Das and they could consequently not be expected to make any extensive enquiry. Their case is that they were assured by Brij Jiwan Das, or on his behalf, that the money was being borrowed partly for

the payment of antecedent debt and partly for the purposes of business. We have examined the evidence and have been taken through the judgment of the learned Judge of the Lower Court and we are satisfied that we would not be justified in saying that his decision was wrong on the questions of fact. There is really very little evidence to show that any part of the money was really borrowed for the purposes of a business. Brij Jiwan Das certainly was carrying on a business, but the evidence of a dismissed servant of his that the money was borrowed for the business has with justification not been relied upon by the learned Judge of the Court below. The mortgagees might have fallen back upon the plea that they were assured that the money was required for the purposes of a business and they had in the circumstances made sufficient enquiry to justify them in acting in the belief that the representations made to them were true, but unfortunately for them they did not take this plea in their pleadings and there is no evidence that they made any enquiry at all. It may be that they were not aware of the possible birth of a son to Brij Jiwan Das, but any person who lends money to a Hindu is supposed to know the law and most people who advance money do know it. They must be aware that they make advances under the risk of claims being made by other members of the joint Hindu family and if they do not take sufficient care to satisfy themselves that there is no body to make a claim or that there is really legal necessity for the advance of the money which is requested of them, then they must bear the consequences. It has not been established that any part of the money was used by Brij Jiwan Das for the purposes of his business, that there was any real need for him to borrow money for these purposes or that the Respondents on enquiry made were satisfied that the money was to be borrowed for legal necessity. The remainder of the money was alleged by the Respondents to have been advanced for the purpose of discharging a debt due from Brij Jiwan Das to, one Rammu Seth. The Respondents maintain that they have paid the money to Rammu Seth, but the learned Judge has believed their evidence. In view of the fact that Rammu Seth has not been called as a witness and there is no documentary evidence either of the existence of the debt or of the receipt by him of the money, we are not in a position to say that the learned Judge was wrong in holding that legal necessity for this part of the advance was not established.

4. The result is that we dismiss the appeal with costs. We allow the cross-objection in part and direct that the decree of the lower Court shall be modified in so far as it is a preliminary decree passed under Order 34, Rule 4. In place of the declaration made by the lower Court that a sum of Rs. 1,411-15 was due at the date of the decree we substitute a direction under the provisions of Order 34, Rule 4, in conjunction with Order 34, Rule 2(1)(a), that an account be taken of what was due to the Plaintiffs at the date of the preliminary decree for principal and interest on the mortgage at the contractual rate and costs of the suit and direct further that the learned Judge of the lower Court shall fix the amount due on an account being taken and thereafter shall fix a date for payment within six months of the date when he signs the account and that the Plaintiffs shall receive

subsequent costs charges and expenses between the date of the signing of the account and the date fixed for payment together with interest during the period from the date of the preliminary decree up to the date fixed for payment at the contractual rate on the principal amount found due. We have already awarded the Respondents their costs of the appeal. We here by direct that those costs shall not be the subject of a separate personal decree in this Court but shall be included in the costs of the lower Court for the period between the date of the preliminary decree and the date fixed for payment and shall be charged in the decree against the property, The same direction will govern the costs of the cross-objection. This cross-objection is valued only at a sum of Rs. 100 and as it has succeeded on the subject of interest we think the whole costs should be allowed to the objection.

5. Learned Counsel on behalf of the Respondents, that is the mortgagees, has urged that this Court should determine rate of future interest, that is, the rate at which interest will be payable after the date fixed for payment if the payment is not made upto that date. It seems to us that this is a matter for the final decree, if any. The question of interest after the date of payment arise until it is known that payment has not been made and it is impossible at this stage to decide what costs, interest and so forth may be due at some future time. The preliminary decree will of course contain a pro vision required by Order 34, Rule 4(1) that the Plaintiffs on failure of payment shall be entitled to apply for a final decree with the directions mentioned in the rule. The part of the decree which is a simple money decree will stand.