
(1930) 11 MAD CK 0045
In the Madras High Court

Gangama Naick

APPELLANT

Vs

N.L.V.R. Veerappa Chetti through his Authorised Agent
Sitaram Ayyangar

RESPONDENT

Date of Decision : 21-11-1930

Acts Referred:

Citation : 131 Ind. Cas. 833

Hon'ble Judges : Madhvan Nair, J

Bench : Single Bench

Judgement

Madhvan Nair, J.—The first defendant is the appellant. This second appeal arises out of a suit to establish his title instituted by a defeated claimant in execution proceedings.

2. The plaintiff obtained an ex parte decree against one Ramakrishna Naicken in O.S. No. 34 of 1915 on the file of the Periakulam Munsifs Court in respect of a promissory note dated 15th October, 1912, for Rs. 600, in execution of the decree the plaintiff's properties were attached on 16th August, 1925, and sold in Court auction and were purchased by the plaintiff on 31st August, 1917. When he tried to take possession of the properties, he was obstructed by the defendants and hence the present suit was filed by him to establish his title.

3. The judgment-debtor, Ramakrishna Naicken, had various dealings with different persons. He had executed a mortgage on 18th August, 1909, for Rs. 5,00 in favour of the first defendant's wife, Subbammal. In 1914 various decrees were obtained against him and he was put in jail. At that time defendants Nos. 1 and 5 agreed to help him to discharge his debts and in consequence, by June, 1915, almost all his debts were discharged. In recompense for his services Ramakrishna Naicken executed a sale deed of all his properties in favour of the first defendant on 14th December, 1914, (see Ex. 1), The first defendant resists the plaintiff's suit on the strength of this document. Generally stated, the other defendants derive their right to the properties from the first defendant.

4. By April, 1917, the first defendant and Ramakrishna Naicken had quarrelled and so, on the 12th of April, 1917, Ramakrishna Naicken instituted O.S. No. 52 of 1917 to set aside Ex. 1, the sale-deed in favour of the first defendant, referred to above. The written statement in the suit was filed on the 23rd August, 1917. I may here mention that the Court sale of the suit properties in favour of the plaintiff was held on the 31st August, 1917, i.e. after the filing of the written statement in O.S. No. 52 of 1917. This fact is important in connection with the plea of *lis pendens* urged by the first defendant to which reference will be made later. On 30th January 1918 the present plaintiff who had by that time purchased the suit properties desired to become a party-plaintiff in O.S. No.52 of 1917 filed by Ramakrishna Naicken. That application was opposed by Ramakrishna Naicken on the ground that the *ex parte* decree obtained by the plaintiff was not a valid one and that he was intending to take proceedings to set aside that decree. While the application was pending, on 10th January, 1919, Ramakrishna Naicken filed an application to withdraw the suit O.S. No. 52 of 1917, with liberty to bring a fresh suit. On Ramakrishna agreeing to pay the costs ordered by the Court within a prescribed time, he was given permission to withdraw the suit. But as he failed to comply with the Court's order regarding costs, the suit was dismissed; and with it, the plaintiff's petition to be made a party was also dismissed.

5. In the present suit the plaintiff stated at first that Ex. 1, the sale deed to the first defendant, is a nominal and sham transaction, by I.A. No. 291 of 1921 he sought an amendment of the plaint to raise the question that the document, Ex. 1, was bad u/s 53 of the Transfer of Property Act, and this was allowed on 8th November, 1921, and an additional issue was raised on 2nd February, 1922.

6. Various issues were raised in the case. Three of the important issues were:

7. Issue No.1. "Whether the sale in favour of the first defendant is sham and colourable;

8. Issue No. 8. "Whether the execution sale in favour of plaintiff is true, and even if true,, is affected by *lis pendens*; and

9. Issue No. 12. "Whether the sale-deed to the first defendant was executed to defeat, delay or defraud the creditors of Ramakrishna Naicken".

10. On the first issue the Subordinate Judge found in favour of the first defendant, On issues Nos.8 and 12 he found in favour of the plaintiff. In the result, the plaintiff obtained a decree and was granted possession of the suit properties but subject to the condition that he should take possession only after paying Rs. 17,644 12-0 which the learned Judge found to have been the consideration paid under Ex. 1 and independently, for the discharge of "certain decrees against Ramakrishna Naicken.

11. No appeal was filed by the first defendant, the present appellant, against the above decree, nor did he call into question the finding that Ex. 1 is transaction to

be avoided as coming u/s 53 of the Transfer of Property Act; but the plaintiff-respondent filed an appeal stating that as Ex. I is found to fall within the scope of Section 53 of the Transfer of Property Act, he should not have been asked to pay any part of the consideration said to have been paid under that document and towards the decrees obtained against its executant, Ramakrishna Naicken. In appeal the learned District Judge modified the decree of the Subordinate Judge to the extent indicated in his decree.

12. Against this decree of the District Judge the plaintiff has filed Second Appeal No. 536 of 1927 urging that the decision of the lower Appellate Court in so far as it is against the appellant is contrary to law.

13. Against "the same decree the first defendant has filed Second Appeal No. 1657 of 1927 urging that the lower Appellate Court should not have interfered with the original Court's decree, for the reason that the plaintiff's suit should have been dismissed on the ground that his purchase was affected by lis pendens and for other reasons; and stating though he had not filed an appeal against the original Court's decree, he is entitled under Order XLI, Rule 22, Civil Procedure Code, to support it before the Appellate Court by urging the aforesaid contention; and that the lower Appellate Court was wrong in not having allowed him to raise that plea.

14. I shall first take up Second Appeal No. 1657 of 1927 filed by the first defendant inasmuch as if he succeeds in his second appeal, the result will be that the plaintiff will have to be content with the first Court's decree in which case, it will be unnecessary to proceed with his Second Appeal No. 536 of 1927. But before discussing the main question raised in the second appeal I shall first deal with the question whether the memorandum of cross-objections filed by the appellant impugning the validity of the decree passed by the first Court was rightly disallowed by the lower Court and whether the plaintiff's suit should have been dismissed on the ground of lis pendens.

15. I have no doubt that the memorandum of objections was rightly dismissed by the lower Court. As already stated, the appellant did not prefer any appeal against the decree of the first Court, nor did he file any memorandum of objections to the appeal filed by the respondent. In the affidavit filed in support of the petition for permission to file the memorandum of objections, the appellant's Vakil stated that "he was allowed to argue that some of the findings in favour of the appellant could not be supported", but this statement was contradicted in the affidavit filed by the Pleader who appeared for the respondent, No reference to these points appears in the judgment of the Appellate Judge, Mr. Bardswell, which distinctly states that no appeal was filed by the present appellant against the decree of the lower Court. It appears to me that the appellant discovered his mistake only after the appeal was after full hearing remitted to the lower Court for findings on the question of mesne profits and then he filed his application for permission to file a memorandum of objections u/s 151, CPC on the 26th March, 1924, that is, after the hearing of

the appeal on 29th January, 1924, and the order calling for findings on February, 1924. The finding was due by 1st July, 1924, This petition was posted for hearing after notice to the other side along with the appeal which had been posted to 3rd July, 1924. After various adjournments the petition was dismissed on 23rd October, 1925, by the then District Judge (Now Mr. Justice Reilly,) by the following order:

This memorandum of objections was presented long out of time and cannot be accepted. The petition is dismissed.

16. After this the defendant-appellant sought to raise the points covered by his memorandum before Mr. Burn, the District Judge, who finally disposed of the appeal but was again disallowed from doing so I am of opinion that the memorandum of objections sought to be filed was rightly disallowed by the lower Court as being long out of time.

17. The next question is whether the plaintiff's suit should have been dismissed by the learned Subordinate Judge on the ground of *lis pendens*, i.e., on the ground that his purchaser of the suit properties was made on 31st August, 1917, after the institution of O.S. No. 52 of 1917 by Ratna-krishna Naicken in which the written statement was filed by the present 1st defendant on 23rd August, 1917. It will be remembered that that suit was ultimately dismissed owing to the failure on the part of Ramakrishna to pay the costs ordered by the Court. The learned Subordinate Judge held that the doctrine of *lis pendens* does not apply as the suit properties had been already attached by the respondent; and that though he no doubt is a person who derived the right, title and interest of Ramakrishna his right to question the alienation and to avoid it is an independent right. This reasoning is contested by Mr. Krishnaswami Ayyar on various grounds Having regard to the decision in *Moti Lal v. Karrabuldin* 25 C. 179 : 24 I.A. 179 : 1 C.W.N. 639 : 7 Sar. 222 and the fact that the respondent is not entitled to get possession except through his right by the purchase of the properties at the Court auction the decision of the learned Subordinate Judge seems to be open to question, but in the view that I am prepared to take on the main question "Whether the appellant is entitled to argue this question at all under Order XLI, Rule 22". I do not think it is necessary to deal with in detail the arguments and the counter arguments addressed to me on this point. For the purpose of this second appeal, I am prepared to assume that the execution sale in favour of the respondent is affected by *lis pendens* and that the learned Subordinate Judge should have dismissed his suit on that ground; but the question is and this is the main question in this second appeal-- whether the appellant who has not filed any appeal against the decree passed against him by the first Court and has also not filed any memorandum of objections in the appeal filed by the respondent, can be allowed to support the decree and insist that it should not be interfered with by the Appellate Court urging the contention that the first Court was wrong in passing the decree against him.

18. It is clear that, if the appellant's contention that the execution sale is vitiated

by lis pendens is upheld, the learned Subordinate Judge was wrong in passing any decree at all against the appellant he should have dismissed the suit in toto. The appellant by preferring an appeal against the decree of the Subordinate Judge urging this contention would have succeeded and got the decree set aside; but he did not file any appeal nor did he file any memorandum of objections, as already stated, impugning the validity of the adjudication made against him on those various points decided against him by the first Court, It is urged that he did not want to get the decree set aside by preferring an appeal as he was quite content to accept the decree that was passed against him and that he was entitled to urge the present plea at the time of the hearing of the appeal preferred by the respondent in the lower Appellate Court. "Can he do so, is the question which I have to decide. Reliance is placed on Order XLI, Rule 22, Civil Procedure Code., in support of the appellant's contention. That order states that "any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below but take any cross objection to the decree which he could have taken by way of appeal.... " In this case we are not concerned with any cross-objections by the appellant; whether he is entitled to file any cross-objections or not, he did not file any such objections in time and when he asked for permission to file them at a late stage in the appeal the permission was rightly refused. In my opinion the words of Order XLI, Rule 22, Civil Procedure Code, do not support the appellant's contention. Though a respondent may have appealed, from any part of the decree he is given permission under the provisions of this order to urge the points decided against him in the Court below in supporting the decree of the lower Court. The words used are " support the decree " and not "attack the decree". A. contention that a ground on which the lower Court has decided against the respondent should have been decided in his favour and, therefore, the lower Court should not have passed the decree under appeal is, in my opinion, not a ground which supports the decree but is one which attacks the decree and, therefore, cannot be urged by the respondent under this order. In support of the lower Court's decree the only grounds decided against him by the lower Court which can be urged by a respondent without filing an appeal against the lower Court's decree are these which will support the decree of the lower Court and not render that decree invalid. If the contention of the respondent is accepted, then it means that though he has not filed an appeal or a memorandum of objections, he is to be allowed to have the benefit of the same indirectly which, I think, is not permissible under the provisions of Order XLI, Rule 22, Civil Procedure Code. If the Court disagrees with the opinion of the lower Court on the point in question, how can the Court doing so allow the lower Court's decree to stand without setting it aside? The result "will be, as pointed out, in *Kishna Kishore v. Din Mohammad* AIR 1929 Lah. 684, to which I shall presently refer that "without any appeal or cross objections we will have to set aside a decree which has been passed in the plaintiff's favour which is not permissible".

19. The appellant's contention is supported by a decision of the Punjab Chief Court reported as Muhammad Ali v. Parma Nand 45 Ind. Cas. 232 : 48 P.W.R. 1918 : 125 P.L.R. 1918. The argument that the respondent who has not filed any appeal against the lower Court's decree or lodged a memorandum of objections should not be allowed to urge a contention impugning the validity of the decree was thus met by the learned Judges of the Punjab Chief Court in Muhammad Ah v. Parma Nand 45 Ind. Cas. 232 : 48 P.W.R. 1918 : 125 P.L.R. 1918.

But we fail to see why a party who is content to accept the lower Court's decision should not resist an appeal from that decision on the ground that the decree errs in favour of the appellant. The respondent, not having appealed nor filed any cross objections, cannot ask that the decree should be altered in his favour but surely he is entitled to urge that, if he can show that the decree errs in favour of the appellant, it should not be disturbed.

20. With all deference to the learned Judges I may observe that the words of Order XLI, Rule 22, Civil Procedure Code, have not been considered by them in this judgment and I am not inclined to accept their view. This decision has not been followed in this Court and has been dissented from in the Lahore High Court in Kishna Kishore v. Din Muhammad AIR 1929 Lah. 684, With respect to a similar contention urged before them relying strongly on the decision of the Punjab Chief Court, the learned Judges of the Lahore High Court made the following observations:

21. We should have thought that the matter was too obvious that no elaborate discussion thereof was necessary. But the learned Counsel relied particularly on Muhammad Ali v. Parma Nand 45 Ind. Cas. 232 : 48 P.W.R. 1918 : 125 P.L.R. 1918, a judgment of a Division Bench of the Chief Court of the Punjab. That judgment might afford some support to the respondent's contention but it was dissented from in Sri Ranga Thatha-chariar v. Srinivasa Thathachariar 104 Ind. Cas. 472 : 50 M. 866 : 26 L.W. 125 : 53 M.L.J. 189 : 39 M.L.T. 234 : AIR 1927 Mad. 801." Then stating that perhaps the facts of the Punjab case are distinguishable from the facts of the case before them they stated:

22. "In any case, we are not prepared to hold that is a clear authority in favour of the respondent's contention." In Sri Ranga Thathachariar v. Srinivasa Thathachariar 104 Ind. Cas. 472 : 50 M. 866 : 26 L.W. 125 : 53 M.L.J. 189 : 39 M.L.T. 234 : AIR 1927 Mad. 801 this Court, after referring to Muhammad Ali v. Parma Nand 45 Ind. Cas. 232 : 48 P.W.R. 1918 : 125 P.L.R. 1918, expressed the opinion that under the rule (O. XLI, Rule 22) "it is not open to respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections". In this connection attention may also be drawn to the decision in Pichai Konar v. Narasimha Rama Iyer 125 Ind. Cas. 247 : 58 M.L. J. 343 : AIR 1930 Mad. 471 : 31 L.W. 832 which also supports the principle contended for by the respondent though it is not a decision under Order XLI, Rule 22. An argument similar to the present one was considered and

overruled by the Calcutta High Court in Shailesh Chandra Guha Vs. Bechai Gope and Others, . That was an appeal by the plaintiff and arose out of a suit for the enforcement of a mortgage by sale of the mortgaged properties. The mortgage was executed by the first defendant in favour of the assignor of the plaintiff. Defendants Nos, 2 to 28 were impleaded as having acquired some interest in different portions of the mortgaged property subsequent to the mortgage. The Subordinate Judge passed a decree in favour of the plaintiff for Rs. 381-0-6 calculating the interest on the principal at the rate of 14 annas per cent, against all the defendants. The plaintiff preferred the appeal against this decree raising various grounds to which it is not necessary to refer in this connection. The defendant did not prefer any appeal nor did they file any memorandum of cross objections but in support of the decree they argued that the frame of the suit was in contravention of Order XXXI7, Rule J, Civil Procedure Code, and that the suit should have been on that ground dismissed by the first Court. This argument was based on the allegation in the written statement that defendant No. 8 has co-sharers who have not been made parties. This question was raised in the third issue in the Court below and decided against the defendants. Though they did not file any appeal against the decree of the lower Court or lodge any cross-objections, they sought to argue the point under Order XLI, Rule 22 by way of supporting the decree of the lower Court. The learned Judges answered the argument thus:

No cross objection was filed by the respondents in this Court under Order XLI, Rule 22 of the Code and it is not, therefore, open to them to take that ground as it is not one in support of the decree made but which, if sustained, would render the decree invalid.

23. Then they stated that as the eighth defendant represented the interest of his co-sharers "the decree cannot, therefore, be reversed on that ground" meaning thereby that the argument that the suit should have been dismissed on the ground urged was untenable even if the defendants were permitted to raise it. I do not think Mr. Krishnaswami Ayyar's contention that the sentence in the judgment "the decree cannot, therefore, be reversed on that ground" should be interpreted as meaning that the learned Judges refused to allow the defendants to raise the contention based on Order XXXIV, Rule 1, Civil Procedure Code, because the defendants actually wanted to get a reversal of the appeal in their favour urging that ground, can be accepted. The learned Judges have clearly explained the reason for his allowing the defendants to raise the contention on the extract quoted above, In farther support of his argument Mr. Krishnaswami Iyer invited my attention to Order LVIII, Rule 6 of the English Rules of Practice which he says corresponds to O, XLI, Rule 22, but the language of the Indian Statute is totally different from the language of the rule referred to, and further, the respondent's learned Advocate contends, that, even according to the English Statute and the decisions thereunder, he would be able to show that the appellant would be clearly precluded from raising his contention. As the terms of Order XLI, Rule 22 are clear and as the decisions of this and other Courts

interpret those terms in the way I have indicated, I do not think any useful purpose will be served by a consideration of Order LXVIII Rule 6 of the English Rules of Practice in relation to the present argument.

24. The appellant's argument has no authority to support it except the decision in Muhammad Ali v. Parma Nand 45 Ind. Cas. 232 : 48 P.W.R. 1918 : 125 P.L.R. 1918, which, as I have pointed out, has not been followed by this Court and other Courts and is clearly not warranted by the terms of Order XLI, Rule 22, Civil Procedure Code.

25. In the result, I must disallow this argument of the appellant. The second appeal will be posted for argument with respect to ground No. 10 raised in the memorandum of second appeal.

26. The said Second Appeal No. 1657 of 1927 and Second Appeal No. 586 of 1927 again came on for hearing on the 18th November, 1933, and the Court delivered the following.

27. Judgment.--Before arguing the point raised in ground No. 10 Mr. Krishna" Swami Iyer argues that, as it was open to the lower Appellate Court under Order XLI, Rule 33 [see Ramaswami Aiyangar v. Official Receiver of Coimbatore 94 Ind. Cas. 535 : 50 M.L.J. 448 : (1926) M.W.N. 419 : 23 L.W. 734 : AIR 1926 Mad. 672] to allow the respondent before it to argue that the plaintiff's suit should be dismissed though he may not have filed an appeal against the decree of the first Court or a memorandum of objections in the appeal filed by the plaintiff, I should now remand the entire case to the lower Appellate Court for consideration as to whether it would exercise, the discretion vested in it by Order XLI, Rule 33 in favour of the present appellant (respondent) before it. The records of the case clearly show--and this is not very seriously disputed--that this point was not raised before the District Judge either at the time of the argument before the remand order made by him or in the memorandum of objections which was filed long out of time. No doubt it was stated in the memorandum of objections that the plaintiff's suit should have been dismissed. This was with reference to the argument under Order XLI, Rule 22, which I have already dealt with in my judgment dated 22nd October, 1830. It is now stated that, as the memorandum of objections has been put in under p. 151, Civil Procedure Code, it must be deemed that this aspect of the argument also comes under it. This is clearly an afterthought. However, the point was not raised before me on the last occasion. It comes for consideration for the first time only now. This by itself is a sufficient ground for refusing the appellant permission to raise the point at this stage of the case. However, I shall consider the argument on its merits.

28. It is true, as held in Ramaswami Aiyangar v. Official Receiver of Coimbatore 94 Ind. Cas. 535 : 50 M.L.J. 448 : (1926) M.W.N. 419 : 23 L.W. 734 : AIR 1926 Mad. 672, that the Appellate Court in a proper case can allow the respondent who has not filed an appeal or a memorandum of objections to argue that the plaintiff's suit should be dismissed. Obviously this power will not be exercised by

Courts except on sufficient grounds. In *Ramaswami Aiyangar v. Official Receiver of Coimbatore* 94 Ind. Cas. 535 : 50 M.L.J. 448 : (1926) M.W.N. 419 : 23 L.W. 734 : AIR 1926 Mad. 672 the Appellate Court exercised its discretion in favour of the respondent because the decision, in which reliance was placed to show that the decision on which the first Court based its judgment was overruled, was passed by the High Court only after the appeal was filed. It was, therefore, thought by the Appellate Court that the case was a proper one in which the discretion vested in it under Order XLI, Rule 33 should be exercised in favour of the respondent. But no such consideration arises in the present case. The Full Bench judgment, *Ramaswami Aiyangar v. Official Receiver of Coimbatore* 94 Ind. Cas. 535 : 50 M.L.J. 448 : (1926) M.W.N. 419 : 23 L.W. 734 : AIR 1926 Mad. 672, reported recently did not in any way alter the law. It interpreted the scope of the power vested in the Appellate Court under Order XLI, Rule 33. There was no prior decision in this Court saying that the Appellate Court has no such power. The appellant had, therefore, no justification for not raising the point before the learned Judge. Apart from this, I do not think the circumstances of the case or such as would justify the exercise of the Court's discretion in the appellant's favour. He is a party to the document Ex. I which was intended to defeat or delay the creditors. It has been found that various false receipts--some of them ante-dated, have been filed to prove the payments made by the appellant. If he wanted to attack the lower Court's decree which clearly held that Ex. I is a document intended to defeat and delay the creditors, he should have filed an appeal against it. This he failed to do and no adequate reason is assigned for this omission. The assertion that the appellant was content to allow the first Court's decree to stand as it was, though the plaintiffs suit ought to have been dismissed is not, having regard to the circumstances of the case, a sufficient explanation for not filing an appeal against first Court's judgment. For these reasons I must reject the plea urged on behalf of the appellant with reference to Order XLI, Rule 33. Now coming to ground No. 10 the District Judge has held that it is obligatory on the part of the respondent, that is the plaintiff, to pay the appellant only the amount including interest which was due to the mortgagee under Ex. II and that it is not necessary that he should pay the various other payments that have been made by the appellant on behalf of Rama-krishna Naicken. Mr. Krishnaswami Iyer argues that the learned District Judge should have held that the respondent should pay him the other amount also or at least the amount of Rs. 3,250 paid by him to release the property purchased by the respondent from attachment in execution of O.S. No. 449 of 1913 and O.S. No. 201 of 1914.

29. He also argues that the calculation of the District Judge with respect to the amount due on the mortgage is wrong. This latter objection is not covered by ground No. 10 and further, I find from the memorandum filed in the lower Court by the respondent Pleader that the calculation is correct. The only question, therefore, is whether the District Judge should have allowed in his favour payments amounting to Rs. 6,470 made by the appellant in discharge of Ramakrishna Naicken's various debts. It has been held in a series of decisions in

this Court: see *Punyam Visvananda Reddi Vs. Gali Raja Venkata Reddi and Others*, and *Subbaroya Goundan v. Peru-mal Chettiar* (9) that when a transfer of Immovable property is set aside, on the ground that it was intended to defeat and delay the creditors, the transferee is entitled to get credit only for the mortgage-debt binding on the property that he may have discharged as part of the consideration for the document and not for the money debts of the transferor discharged by him. In this case, as already observed, the mortgage amount due under Ex II has been allowed in favour of the appellant. Following the decisions which I have just referred to, I hold that the learned District Judge was right in disallowing the various other amounts claimed by him. With respect to the sum of Rs. 3,250 a special argument has been advanced. It was argued that this amount should be treated separately because it was paid to release the suit property from the existing attachment. An attachment does not create any charge on the property and, therefore, there is no justification in according to this amount the same consideration that was given to the amount under Ex. II and farther, the payment of this amount is not described as one of the considerations in Ex, I.

30. It is next argued that the learned District Judge should have allowed interest on the mortgage amount, Rs. 6,113-8-0 found due to the appellant from 14th December, 1914, the date of Ex. I up to 30th December, 1917, the date of the symbolical delivery of possession to the plaintiff, and reliance is placed in support of this contention on *Piehai Konar v. Narasimha Rama Iyer* 125 Ind. Cas. 247 : 58 M.L.J. 343 : AIR 1930 Mad. 471 : 31 L.W. 832. I do not think that the general principle laid down in this decision can be applied to the present case having regard to the terms of Ex. I. Under it, it is assumed that the mortgaged debt under Ex. II has been discharged by that time. The appellant is, therefore, entitled to get only the amount of the mortgage and the interest up to that date. If he is allowed interest up to 30th December, 1917, it will involve the assumption that, the mortgage remained undischarged up till that date which will be contrary to the terms of Ex, I. I think it is on this basis the lower Courts have proceeded in finding what is the amount "due to the appellant with respect to the discharge of Ex II. Having regard to the facts of this case, I would hold that the lower Court was not wrong in not awarding interest in favour of the appellant on the amount found due to him under the mortgage Ex. II

31. No other points were argued before me in connection with this second appeal. For the reasons given above, this second appeal is dismissed with costs.

32. S.A. No. 536 of 1927.

33. The plaintiff is the appellant. This second appeal is connected with the other second appeal just disposed of, both arising out of the same original suit filed by the plaintiff, i.e. O.S. No 27 of 1920. The facts of the case have been mentioned in the judgment in the other Second Appeal No. 1657 of 1927.

34. The questions for decision in this second appeal are simple ones and relate to

"costs," "interest1" and "mesne profits" awarded by the lower Court. The lower Appellate Court awarded proportionate costs to the appellant since he was only part successful in the appeal. It is argued that he should have been awarded a sum of Rs. 444-11-0 by way of additional costs. This sum is calculated apparently with reference to the amount or the mortgage Ex. II discharged by the first defendant. It must be noticed that this sum was also included in the appeal filed by the plaintiff, the present appellant, to the lower Appellate Court. It is argued that if an endorsement by the mortgagee regarding the discharge of the mortgage had been filed in the first Court, this sum would not have been included in the appeal. I have no doubt that all these considerations must have been present in the mind of the learned District Judge when he passed his order relating to costs. Courts have a very wide discretion in making order as to costs. In this case the learned Judge has given this reason for ordering only proportionate costs for the appellant. I cannot find any ground for interfering with the order as to costs made by him. In the first Court the learned Judge did not make any order as to costs "containing the circumstances of the case". It is argued that the plaintiff should have been awarded his costs in the first Court. What I have said already regarding the order of costs made by the District Judge applies in this case also.

35. The next argument relates to the award of interest at 15 percent, for the amount due under the mortgage. It is argued that the Appellate Court should have decreed interest only at the primary rate of 14 annas per mensem and not at the rate of 15 per cent. Under the document, Ex. II, the interest at 15 per cent, becomes payable if the principal is not paid in five years. When the amount was not paid within the stipulated time the condition for the enforcement of the 15 percent, interest, came into existence and I think the lower Court was right in awarding interest at that rate. I do not consider the rate to be penal. It is then argued that interest should have been calculated not on Rs. [6,113-8-0 found due under the mortgage together with interest, but only on the principal sum of Rs. 5,000. Having regard to the fact that interest was not paid at the end of each year, I think on a proper construction of the terms of the document the decision of the learned Judge that interest should be calculated on Rs. 6,113-80 cannot be said to be wrong.

36. The next question to be dealt with relates to the rate of the mesne profits allowed by the lower Court. Both the Courts have come to the same conclusion regarding the rate. This is a pure question of fact. It is argued that interest on mesne profits should have been allowed in favour of the appellant and that the lower Court was wrong in not allowing it having regard to Section 2 (12), Civil Procedure Code. No doubt ordinarily the appellant would be entitled to interest on mesne profits but such interest may be disallowed on special grounds. In this case (see para. 6 of his judgment) the learned Judge has given sufficient reasons to show why the appellant should not be given such interest and I cannot, therefore, interfere with his order.

37. No other points were argued before me in this second appeal. In the result, this second appeal fails and is dismissed with costs.