(1903) 12 PRI CK 0004

In the Privy Council

Kedar Lal Marwari APPELLANT

Vs

Bishen Pershad RESPONDENT

Date of Decision : 02-12-1903

Acts Referred:

Citation : (1904) 31 ILRPC 332

Hon'ble Judges : Macnaghten, Lindsay, Andrew Scobie, Arthur Wilson, John Bonser, JJ.

Judgement

Macnaghten, J. 1. This suit was brought by the late appellant, Biseswar Lal Marwari, to enforce a mortgage bond dated the 5th of September 1886 hypothecating, together with other property, 8 annas of a mouzah known as Burhanpore or Badhanpore. 2. It seems that this share of Burhanpore was included in an earlier mortgage bond dated the 27th of January 1884. The owner of that encumbrance brought a suit to enforce his security and obtained a decree. The property was put up for sale on the 6th of December 1890. It was then bought for Rs. 2,505 by the late respondent, Dewan Bishen Pershad, in the name of his relative Sambhu Sahai. The encumbrancer from whom the appellants derive title was not a party to this suit or bound by the decree for sale. 3. Another suit (No. 47 of 1890) brought in respect of the same property on a bond dated the 4th of October 1882 resulted in a decree dated the 29th of June, 1891. The principal question in that suit was as to the rate of interest on the money secured by the bond. The bond purported to reserve interest at the rate of 2 per cent, per month, with annual rests and compound interest. But the learned Judge held that rate exorbitant and improper under the circumstances, and allowed only simple interest at the rate of 1 percent, per month, or 12 per cent, per annum. Shambhu Sahai, who represented the Dewan, was added as a party, and the decree was pronounced in his presence and also in the presence of the person from whom the appellants derive title, who being already a party to the suit was ordered to be "made a defendant as a subsequent mortgagee." Under this order, which was dated the 8th of September 1890, amendments seem to have been made though they are not to be found in the record. The order for sale of the property appears to have been made absolute. But on the day of the auction the Dewan deposited the amount found due to the plaintiff, the decree-holder. It was accepted by him. The sale did not take place and the order for sale dropped. There was at the time an appeal pending on behalf of the plaintiff, who was dissatisfied with the rate of interest allowed, and also a cross-appeal on behalf of the Dewan on some question of costs. Ultimately a compromise was made. The Dewan paid the plaintiff Rs. 8,000 in addition to the amount found due to him. By an order of the High Court dated the 21st of June 1892 the plaintiff''s appeal was by consent dismissed without costs, and so the order reducing the rate of interest on the bond of the 4th of October 1882 as against the mortgaged property and the subsequent-mortgagees became absolute. 4. In the present suit Bisseswar Lal obtained a decree to enforce his mortgage security of the 5th of September 1886. The Dewan who, as purchaser at the sale of the 6th of December 1890, had succeeded to the rights of the mortgagor and who also stood in the shoes of the decree-holder under the decree of the 29th of June 1891, declined to redeem, and accounts were directed to be taken in view of Bisseswar Lal either redeeming the Dewan or in default of payment standing foreclosed. 5. The accounts as passed by the Subordinate Judge, allowed the Dewan the sum found due to the plaintiff in the suit No. 47 of 1890, with interest on the sum secured by the bond of the 4th of October 1882 at the reduced rate allowed by the decree of the 29th of June 1891, and also the sum of Rs. 8,000 paid by the Dewan to the plaintiff in that suit on the occasion of the compromise, which resulted in the order of the High Court dismissing the plaintiff''s appeal. 6. From the final decree in this suit of the 20th of April 1896 the Dewan appealed to the High Court. The judgment of the High Court was pronounced on the 23rd of May 1898. The Court held that the Dewan was entitled to recover the sum of Rs. 2,505 paid for the property at the sale of the 6th of December 1890, which was allowed by the Subordinate Judge and to which no objection was taken in the High Court, and also the amount of principal and interest secured by the bond of the 4th of October 1882, "according to the terms of that document up to date,"? while on the other hand he had "to account for rents and profits in the ordinary way up to date." A slip in the accounts of rents and profits as passed by the Subordinate Judge was corrected. No order was made as to costs in the High Court. 7. The effect of that order, as worked out with interest at 2 per cent, per month and annual rests, resulted in Bisseswar Lal having to pay Rs. 1,21,546-18-1 in order to recover 8 annas of Burhan pore. 8. The appellants contend that the Dewan was not entitled to a higher rate of interest under the bond of the 4th of October 1882 than that allowed by the decree of the 29th of June, 1891. Their, Lordships think this contention is plainly right. The High Court gives no reason for disregarding the decree of the 29th of June 1891, and none was given at the Bar. The predecessor in title of the appellants was a party to that decree as well as the Dewan, and the Dewan Himself before the Subordinate Judge claimed to be allowed, and was allowed, as against Biseswar Lal and the mortgaged property, the sum of Rs. 8,000, which he voluntarily paid as the consideration for haying the decree reducing the rate of interest made absolute. 9. It was contended on behalf of the Dewan''s representatives (who alone defended this appeal) that Bisseswar Lal ought to have enforced his right, if any, in the suit No. 47 of 1890, and that it was not competent for him to bring a fresh suit. Assuming that contention to be well founded, it seems to their Lordships much too late now to raise a point not insisted upon in either of the Courts below. It was also urged that the effect of the Dewan finding the money to pay off the plaintiff in the suit No. 47 of 1890 was to foreclose all subsequent mortgages and make the Dewan absolute owner of the property. It is hardly necessary to say that their Lordships were unable to accept that view of the transaction. 10. Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be discharged, and that the Dewan''s representatives ought to pay the costs in that Court, and that the order of the Subordinate Judge ought to be restored, subject to correction of the slip in that order pointed out by the High Court, the accounts brought up to date and six months from the date of His Majesty''s Order in Council fixed for redemption of the property. 11. The Dewan''s representatives will pay the costs of the appeal. 12. Their Lordships observe that the Record in this case was received in December 1900, but that the case was not set down for hearing till September 1903. They have accordingly directed the Registrar to disallow to the appellants any costs which, in his view, may have been occasioned by delay on the part of the appellants in prosecuting the appeal.

