(1941) 09 PAT CK 0002

In the Patna High Court

Sukhraj Rai and Others — APPELLANT

Vs

Ratinath Panjira and Others — RESPONDENT

Date of Decision : 04-09-1941

Acts Referred:
Bihar Money Lenders Act, 1938 — Section 11, 13

Citation : AIR 1942 Patna 102

Hon'ble Judges : Harries, C.J;Chatterji, J

Bench : Full Bench

Judgement

Chatterji, J.—This is an appeal by the plaintiffs in a mortgage suit. The mortgage was executed on 2nd July 1912, by the then kartas of the defendants'' joint family in favour of one Parbodh Chandra Banerji for an advance of Rs. 7000 carrying compound interest at 10 per cent, per annum with yearly rests. The plaintiffs have acquired by purchase the interest of the mortgagee Parbodh Chandra Banerji. The mortgage is sought to be enforced against the joint family of the defendants on the allegation that the loan was contracted for legal necessity. After giving credit for payment of RS. 11,859-11-4? towards interest and Rs. 500,towards principal, the claim was laid at Rs. 16,151-7-0. The last of these payments was made on 15th Jeth 1388 (17th May 1931), and the suit was instituted on 1st May 1937. Though the suit was brought much more than 12 years after the mortgage money became payable, limitation was sought to be saved by the different payments made. One of the defences raised in the suit was that the rate of interest was high and excessive.

2. The learned Subordinate Judge who tried the suit did not come to any definite finding as to whether the stipulated rate of interest was high and excessive. He, however, applied the provisions of Section 11, Bihar Money-lenders Act, 1938, which has since been replaced by Section 7 of Act 7 of 1939. Under that section the interest recoverable up to the date of the suit cannot exceed the amount of the principal mentioned in the bond in suit. As the payments made towards interest were much in excess of Rs. 7000 the amount of loan mentioned in the

mortgage bond in suit the learned Subordinate Judge did not allow any interest. There being a payment of Rs. 500 towards principal, he passed a decree for Rs. 6500 only without any further interest. He overruled the other defences raised in the suit and passed a mortgage decree for Rs. 6500 only. He, however, granted instalments according to the provisions of Section 13, Bihar Money-lenders Act, 1938, now replaced by Section 10 of Act 7 of 1939, the instalments being of Rs. 500 each payable on 15th February of each year from 1939 to 1951. The plaintiffs being dissatisfied with this decree, have preferred this appeal.

3. The first point raised by Mr. S.C. Mazumdar for the appellants is that the learned Subordinate Judge had no power to refuse pendente lite interest. So far as the interest payable up to the date of the suit is concerned, he concedes that under the provisions of Section 7, Bihar Money-lenders Act (Act 7 of 1939) the decree is perfectly correct. As regards the pendente lite interest the learned Subordinate Judge does not give any reason at all for refusing it. He refers to Section 11 of the Act of 1938, which however expressly limited the interest payable up to the date of the suit to the amount of the loan advanced. That section (the new Section 7 of Act 7 of 1939) does not deal with the interest payable after the date of the suit. The learned Subordinate Judge, therefore, if he really dieted upon Section 11, Bihar Money-lenders Act, was entirely wrong in refusing pendente lite interest. Pendente lite interest is governed by the provisions of Order 84, Rule 4, Civil P.C. Under that rule read with Order 34, Rule 2, the Court shall pass a preliminary decree.

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for.

(i) principal and interest on the mortgage.

4. It is thus quite clear that in passing a preliminary decree the Court is bound to grant interest up to the date of such decree. This was also pointed out by their Lordships of the Privy Council in AIR 1927 1 (Privy Council) . In that case it was held that:

On a preliminary decree for foreclosure or die under Order 34, Rules 2, 4, Civil P.C., 1908, a mortgagee is entitled to interest at the rate, and with the rests, stipulated in the mortgage down to the date fixed for redemption by the decree.

5. Mr. Mahabir Prasad for the respondents however has drawn our attention to a decision of the Federal Court in Jaigobind Singh v. Lachmi Narain Ram AIR 1940 P.C. 20, in which their Lordships held that Order 84, Rule 11, which was inserted in the Civil Procedure Code, by the Amending Act 21 of 1929, gives a certain amount of discretion to the Court, so far as interest pendente lite and subsequent interest are concerned. Their Lordships, however, did not intend to lay down that the Court has a power under Order 34, Rule 11 to refuse pendente lite interest altogether. This will be clear from the following passage:

It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918.

6. Under the clear provisions of Order 34, Rule 2 the mortgagees are entitled to interest up to the date of the preliminary decree. The relevant portion of Order 34, Rule 11 is as follows:

In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage.

7. This makes it clear that Rule 11 does not affect the Court''s power to allow pendente lite interest under Order 34, Rule 2. It cannot therefore be contended that their Lordships of the Federal Court intended to lay down that under Order 84, Rule 11 the Court can refuse pendente lite interest altogether. In fact, Mr. Mahabir Prasad frankly concedes that he cannot maintain this position on the authority of the decision of the Federal Court. It is to be observed that the decision of the Privy Council in AIR 1927 1 (Privy Council) , was referred to by their Lordships of the Federal Court in Jaigobind Singh v. Lachmi Narain Ram AIR 1940 P.C. 20. We are bound by the decision of the Federal Court in which the Privy Council case was considered. However, under the decision of the Federal Court the Court has a discretion under Order 34, Rule 11 in the matter of awarding pendente lite interest.

8. The question then remains what rate of interest ought to be allowed. Ordinarily the contractual rate ought to be allowed, unless it appears to be penal or excessive. The contractual rate in this ease is ten per cent, per annum compoundable every year. So far as the compound interest is concerned, some of the defendants in their written statement took the objection that there was no legal necessity for borrowing the money on such a high rate of interest. As held by their Lordships of the Privy Council in Ram Bujbawan Prasad Singh v. Nathu Ram AIR 1923 P.C. 37, it is necessary for the plaintiffs mortgagees to prove not merely that there was legal necessity for the borrowing but also that the interest agreed to be paid was the usual commercial rate. Unfortunately, the learned Subordinate Judge did not approach the case from this point of view. It would have been therefore necessary to send back the case to him for a finding on the point; but Mr. Mazumdar for the appellants agrees to forego compound interest if simple interest at ten per cent, be allowed. Simple interest at ten per. cent, per annum is certainly a very fair and reasonable rate. In my opinion, therefore the plaintiffs are entitled to pendente lite interest at ten per cent, per annum simple. The next point taken by Mr. S.C. Mazumdar is that the Subordinate Judge was entirely wrong in allowing instalments. In granting instalments he relied upon the

provisions of Section 14 Bihar Money-lenders Act, 1938 (corresponding to Section 10 of the present Act 7 of 1939). But Section 12 of the same Act provides that before fixing instalments the Court shall take into consideration the circumstances of the judgment-debtor, the amount of the decree and the capacity of $he judgment-debtor to pay the instalments on the due dates. Unfortunately, the learned Subordinate Judge has not paid any attention to these provision. What he says is simply this:

They (the defendants) went on paying interest so long as they could. They were however hit hard by the present economic depression and now they find it difficult to make payment in one instalment. They have already paid almost the double of what they had borrowed. I think they should get liberal instalments.

10. In my view this is quite an arbitrary way of dealing with the matter. Mr. S.C. Mazumdar realises the difficulty and asks us to come to an independent finding on the evidence on the record, due regard being had to the provisions of Section 12, Bihar Money-lenders Act. But, on the materials on the record, I do not feel justified in expressing any opinion on the point. The parties as well as the Court seemed to have overlooked the provisions of Section 12 of the Act. In my opinion, therefore, the proper course would be to set aside the order for instalments. It will be open however to the defendants to raise the objection in execution proceeding under the provisions of Section 11, Bihar Money-lenders Act of 1939. If proper materials are then brought on the record, it will be for the Court to decide whether any case for granting instalments has been made out or not. In the result, I would allow the appeal in part and, modify the decree passed by the Court to this extent that there will be no order for instalments and that the plaintiffs will be entitled to pendente lite interest at ten annas per cent, per annum simple from the date of the suit till the expiry of two months from this date which I would fix as the period of grace. The decretal amount will carry future interest at six per cent, per annum from the date of the expiry of the period of grace fixed by this Court until realisation. In other respects the decree of the Court below will stand. As regards this Court, the parties should bear their own costs.

Harries, C.J.

I agree.

