

(1949) 09 PAT CK 0009
In the Patna High Court
Case No : A.F.A.D. No. 1741 of 1948

Thakan Sahu and Others

APPELLANT

Vs

Rampartap Mahto and Others

RESPONDENT

Date of Decision : 05-09-1949

Acts Referred:

Transfer of Property Act, 1882 — Section 77

Citation : AIR 1950 Patna 201

Hon'ble Judges : Das, J

Bench : Single Bench

Advocate : Rajkishore Prasad, for the Appellant; Janak Kishore, for the Respondent

Final Decision : Dismissed

Judgement

Das, J.—This is a second appeal by the plaintiffs and arises out of a suit for redemption. The point raised in this appeal is a very short one, and would appear from the facts stated below. The ancestor of the appellants had given in bharna by a bond dated 28th August 1928, 7 bighas 9 kathas and odd of kast land to the ancestor of the defendants for a consideration of Rs. 2100. The contract between the parties was that if the mortgagor would remain in possession of the bharna property, he would pay interest at the rate of 10 percent per month in respect of the bharna money to the mortgagee. The mortgagor remained in possession till 1338 Fasli and paid interest to the mortgagee. Thereafter, the mortgagee was put in possession, not of the entire 7 bighas 9 kathas and odd, but of 5 bighas and odd only, that is, excluding 2 bighas 14 kathas and odd. The defendants respondents set up a plea with regard to this deficiency of a bighas and odd that there was a fresh contrast between the parties that the mortgagor would pay interest at 10 percent per month on Rs. 766, being the proportionate consideration of the bharna in respect of 2 bighas 14 kathas and 6 dhurs. The learned Munsif accepted the case of the defendants, and held that the appellants were entitled to redeem on payment of a further sum of Rs. 938/12/- which was

the interest on the proportionate amount of consideration for 2 bighas and odd. The learned Subordinate Judge held that the defendants had failed to establish a subsequent agreement between the parties to pay interest in respect of. Rs. 766 the proportionate amount of the bharna consideration for the deficiency of the area of the mortgaged property. The learned Subordinate Judge, however, held that the defendants-respondents were entitled to interest by way of damages. He applied the Bihar Money-lenders Act, and held that the interest which the defendants were entitled to claim could not exceed the amount of Rs. 766. He, therefore, passed a decree for redemption in favour of the appellants on their depositing the sum of Rs. 766 and not Rs. 938/12/- as found by the learned Munsif.

2. In the appeal before me, learned counsel for the appellants has contended that in view of the finding of the learned Subordinate Judge that there was no subsequent agreement between the parties to pay interest on Rs. 766 the learned Subordinate Judge was wrong in his view that the defendants respondents could claim interest by way of damages. In my opinion, no question of interest by way of damages arises in this case. It is true that the defendants respondents did plead a subsequent agreement between the parties to pay interest on Rs. 766 the proportionate bharna money with regard to the deficit area of 2 bighas and odd. The learned Subordinate Judge held that the defendants-respondents had failed to prove such a subsequent agreement. Accepting this finding of the learned Subordinate Judge to be correct, the defendants-respondents were yet entitled to fall back on the stipulations in the original mortgage bond of 1928. The contract embodied in the original mortgage bond of 1928 is a contract admitted by both parties and is binding on them. In the original mortgage bond of 1928 also, there was a stipulation to the effect that the mortgagor would pay 10 per cent, per month as interest on the bharna money if the mortgagee was not given possession. The mortgagee was not given possession of 2 bighas and odd. Therefore, as per stipulations in the original mortgage bond, the defendants-respondents were entitled to claim interest on the proportionate amount of the bharna consideration. Therefore, the defendants-respondents were entitled to fall back on the contract embodied in the original mortgage bond, and on that contract they were entitled to claim the stipulated interest on the amount of the consideration money proportionate to the area of which they were not given possession. The learned Subordinate Judge was right in his view that the defendants-respondents' claim for interest on the original contract was not barred by time.

3. As to the amount which the defendants-respondents are entitled to claim, the Courts below have differed, and the difference is due to the application of the Bihar Money-lenders Act by the learned Subordinate Judge. On behalf of the defendants-respondents a cross-objection has been filed, and it has been contended that Section 7, Bihar Money-lenders Act, presumably the section which the learned Subordinate Judge had in mind, does not apply. Section 7 states, *inter alia*, that no Court shall, in any suit brought by a money-lender

before or after the commencement of the Act in respect of a loan advanced before or after the commencement of the Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced. Now, the suit out of which this appeal has arisen, was not a suit brought by a money lender. It was a suit for redemption brought by the debtor; therefore, Section 7, Money-lenders Act, did not, in express terms, apply. In my opinion, the learned Subordinate Judge was wrong in applying Section 7, Bihar Money-lenders Act, to a suit by a debtor.

4. For the reasons given above, the appeal is dismissed, and the cross-objection is allowed with costs. With regard to the amount which the appellants have to pay in order to redeem the property, the decision of the learned Subordinate Judge is set aside and that of the learned Munsif is restored. The appellants will have six months' time to deposit the amount with effect from to day.