

(1914) 08 CAL CK 0012
In the Calcutta High Court

Udit Narayan Jha

APPELLANT

Vs

Musammat Jasoda Sahun Kalan and Others

RESPONDENT

Date of Decision : 20-08-1914

Acts Referred:

Citation : 46 Ind. Cas. 469

Hon'ble Judges : Walmsley, J;D. Chatterjee, J

Bench : Division Bench

Judgement

D. Chatterjee, J.—Musammat Nainabaty, a Hindu widow in possession of the estate of her husband, and the next reversioner, who is the appellant before us, jointly executed a mortgage-bond on which the creditor obtained a decree against both and executed the same against both, claiming interest at the bond rate until actual payment. Nainabaty alone made an objection as regards interest subsequent to the period of grace but her objection was disallowed and an appeal to the High Court was filed but withdrawn. The two judgment-debtors then jointly sold a part of the mortgaged property by private sale under the sanction of the Court and satisfied a part of the decree. The decree was then sold to the respondent, who applied for execution claiming interest at the same rate as the original decree-holder: pending execution Nainabaty died and the appellant was substituted in her place: as he was already a judgment debtor on the record as a reversioner, this order of substitution must mean that he then became a judgment-debtor in his own right as full owner. He now filed a fresh objection on the ground that the decree-holder was not entitled to interest after the period of grace under the terms of the decree: about the same time he filed an application for the amendment of the decree on the ground that it was not in accordance with the judgment. These two proceedings were run as alternative proceedings, so that if the one failed the other might be fought out. Both the applications were rejected and we have before us the miscellaneous appeal in the objection case u/s 47 and the Rule in the amendment case.

2. The first question that suggests itself on the facts stated is one of the

competency of the present proceedings. The appellant Udit Narain was a party to the decree and a party to the execution: can he re-open matters settled by orders made prior to the death of Nainabaty? I think there is a fallacy involved in the question. The Udit Narain that was a party before the death of the widow in possession was merely the presumptive reversioner Udit who had no present interest in the property in dispute, who had a mere contingent interest, a mere spes successionis which he could not dispose of: his right was contingent on his surviving the widow and might never come into being. The Udit Narain who has initiated these proceedings is the present heir of the last male owner and is fully clothed with all the rights of a proprietor. The identity is only in the name and not in the title or the character; so far as these are concerned he is quite a different man. I think he is entitled to defend his newly acquired title by all means accessible, to his new character. Coming to the merits, I find that the ordering portion of the judgment was: "The principal amount is to bear interest at the rate stipulated in the bond and the costs to bear interest at 6 per cent. per annum, should the defendant 1st party make default to pay the decretal amount within 6 months from this date it shall be realised by the sale of the mortgaged properties".

3. The decree gives the (1) principal with interest at the bond rate up to date of suit, (2) interest at the bond rate from date of suit to the date of realization, (3) interest on the interest at 6 per cent. per annum from date of suit to date of realization, (4) interest on costs at 6 per cent. per annum from date of decree to date of realization, (5) costs, and then orders that if they fail to pay the whole of the decretal amount within the period fixed by the Court (6 months) the decretal amount would be realized by the sale of the mortgaged properties.

4. Under the provisions of Sections 86 and 88 of the Transfer of Property Act as interpreted by their Lordships of the Privy Council in the case of *Sundar Koer v. Rai Sham Krishen* 34 C. 150 : 5 C.L.J. 106 : 4 A.L.J. 109 : 9 Bom. L.R. 304 : 11C.W.N. 249 : 17 M.L.J. 43 : 2 M.L.T. 75 : 34 I.A. 9 (P.C.): " A general account shall be taken once for all and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that after the expiration of that day if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should thence forth depend not on the contents of his bond but on the directions in the decree." Section 209 of the old Civil Procedure Code, which applies to the present decree, provided that when the Court gives a decree for money it can direct, in addition to the principal sum with interest up to date of suit, the payment of interest on the principal at a reasonable rate from date of suit to date of decree and further interest from date of decree to date of payment. If no such interest is expressly given it is to be considered as refused.

5. Now if Sections 86 and 88 of the Transfer of Property Act include the whole period up to the expiration of the period of grace, the jurisdiction to grant further interest must be u/s 209 of the Civil Procedure Code: for it is after that period

that the matter passes from the domain of contract to the domain of judgment.

6. In the present case there is no indication of any interest being decreed subsequent to the period of grace; all the five items of the decree including the costs form the decretal amount the failure to pay which would make the amount realizable by sale. This is the preliminary decree and until the 6 months expired there was no knowing whether any further interest would be payable. It seems that the proper period for allowing further interest would be when the decree absolute is made. The decree absolute or rather order absolute in this case does not provide for any such interest, and I think no such interest was given by the decree. It is contended that the words in the original *ta-roz-wosool* used in contradistinction from the words *adai* show that the decree meant to make a distinction between the date fixed for payment and the date of actual realization. I think this argument is not sound. The words *wosool* and *adai* are relative terms. The creditor makes *wosool* or realization when the debtor makes *adai* or payment. So that the decree as made seems to speak of the same point of time by the words *wosool* and *adai* and is to my mind one in accordance with the judgment. It is true that it allows interest on interest at 6 per cent. per annum from date of suit to date of realization but that has been accepted. In this view of the matter, I think that the Rule should be discharged and the appeal decreed. The interest will be calculated up to the end of the period of grace and if on that calculation anything is found due to the decree-holder, execution will go on for the same. If the whole amount due should be found to have been satisfied before the present objection the execution case will be dismissed. The appellant is entitled to his costs, which we fix at 3 gold mohurs.

Walmsley, J.

7. I agree.