

Binda Prasad Vs. Madho Prasad and ors.

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SooperKanoon Citation : sooperkanoon.com/448141

Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1880)ILR2All129

Judge : Turner and ;Oldfield, JJ.

Appellant : Binda Prasad

Respondent : Madho Prasad and ors.

Judgement :

Turner, J.

1. The appellant, being the holder of a mortgage for Rs. 4,800 and interest, brought this suit to recover the debt by the sale of the mortgaged property, and also by the ordinary process of execution against the person and property other than that mortgaged of the debtor. The term of the mortgage had expired, and the defendant made no defence save that interest was not payable after the expiry of the term, but he prayed the Court would order the payment of the debt by instalments of Rs. 700 per annum, and without interest. The Court below held that, even if the terms of the mortgage-deed did not distinctly provide for the payment of interest after the expiry of the term, the plaintiff was entitled to recover interest as damages, and to this finding no objection has been taken on appeal, but it has also considered that, inasmuch as the defendant was hard pressed, it might fairly award that the debt should be payable by instalments of Rs. 800, and should bear

interest at the rate of 6 per cent. The plaintiff has contended in appeal that the decree varies the contract specifically affecting the security, and that the Court was incompetent to direct payment of the mortgage-debt by instalments, that if it had the power to do so it has not properly exercised its discretion in so doing, in that there were no sufficient reasons for ordering payment by instalments, that the instalments ordered defer the complete payment of the debt for a longer period than is equitable, viz., ten years, and that on deferring the satisfaction of the debt for so long a period the Court ought to have allowed the usual rate of interest, viz., 12 per cent. per annum.

2. The Code recognises the distinction which is well known in our Courts between money-decrees and decrees for the recovery of a debt by the sale of property mortgaged for its satisfaction. I may refer to the provisions of Sections 322 and 323, and I therefore incline to the opinion that the provisions of Section 210 were intended to apply to what are commonly known as money-decrees, and not to decrees in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting the property.

3. There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by instalments, the Court may be well intrusted with a discretion to arrange the payment of a debt by instalments, but when a contract is distinctly made for payment on a date certain for the purpose of enabling the creditor to obtain punctual payment, the circumstance that the payment is secured by an hypothecation of property ought not to deprive him of that right. We have, moreover, to interpret the law without examining its policy, and it would, in my judgment, probably be held that the provisions of Section 210 apply, as in terms they appear to apply, only to decrees for the payment of money.

4. In the case before the Court the plaintiff sought not only a money-decree but a decree for the sale of the property in pursuance of the contract by which it was specifically affected, and therefore, if the construction I incline to put on the terms of Section 210 be right, in the absence of consent on the part of the plaintiff the

Court had no power to vary the contract and direct payment by instalments, but if it had that power, I am of the same mind with my honourable colleague, that there was no sufficient reason for its exercise in this case, and that it has exercised it injuriously to the plaintiff by the length of the period over which the instalments are extended, and by allowing a rate of interest less than the ordinary market rate on mortgages of land when the payment is so long deferred. On this ground I also concur in the result of the judgment of my honourable colleague.

5. The proceeding to which the Subordinate Judge adverts as containing a consent on the part of the appellant to take payment by instalments has been considered. The appellant's pleader no doubt stated his client was willing to take payment by instalments spread over three years, but his offer was not accepted, and he was therefore at liberty to insist on the payment of the debt forthwith. I concur then in the decree proposed by my honourable colleague.

Oldfield, J.

6. The plaintiff sued for the recovery of a sum of money with interest secured by the mortgage of immoveable property. The lower Court found in favour of the plaintiff as to the amount due, but made a decree to the effect that the whole sum and the costs of the suit should be paid by instalments of Rs. 800, the first instalment being payable by the end of the year, and interest at the rate of 6 per cent. per annum should be paid on each instalment from date of decree, and if any instalment with interest on it be not paid by the due date, the plaintiff will have the right to realise at once the amount due from the hypothecated property in the first instance, and then from other properties of the defendants as well as their persons.

7. The question in the appeal preferred by the plaintiff is whether the order directing the payment by instalments can be set aside, and an order made for enforcement of the hypothecation by sale of the property in the event of the immediate non-payment of the debt.

8. The lower Court's order has been made under Section 194 of Act VIII of 1859, and a question has been raised whether that section is applicable to decrees for

the payment of money by sale of immoveable property. I should hesitate to hold that the section contemplates a distinction of the kind suggested, and I incline to think that, whether the decree decrees the payment of money simply, or proceeds, to direct its realisation by sale of particular property mortgaged as security in event of non-payment, it is still a 'decree for the payment of money' in the words of the section, when the Court may order the amount to be paid by instalments. There seems no reason why a simple debt should, when decreed, be payable at the discretion of the Court by instalments, and not a debt secured by the mortgage of immoveable property. On the contrary when there is such security there is all the less risk to the creditor from delay in payment incident to payment by instalments.

9. But it is only on sufficient reason being shown that a Court can exercise the power allowed, and no sufficient ground is disclosed here. All that the Subordinate Judge says on the point is that the defendants are hard pressed, and he holds it not unfair that the instalments should be paid at the rate of Rs. 800 per annum. The reason assigned amounts to nothing more than an inability to pay, but that is no sufficient reason why execution should not at once proceed. It is denied that the plaintiffs were willing to allow the defendants to pay the debt by instalments, but at any rate any offer made was not accepted, and there is no reason why the claim should not be decreed. The decree should be modified and the claim decreed, with costs and interest at 6 per cent. from date of the institution of the suit, by sale of the property hypothecated, and this appeal decreed with costs.