

Ajkumar Singh and ors. Vs. Ram Saran and ors.

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SooperKanoon Citation : sooperkanoon.com/456721

Court : Allahabad

Decided On : Jul-14-1909

Reported in : 3Ind.Cas.33

Judge : Banerji and ;Richards, JJ.

Appellant : Ajkumar Singh and ors.

Respondent : Ram Saran and ors.

Judgement :

1. This appeal arises out of an application under Section 90 of the Transfer of Property Act. Certain property was mortgaged and afterwards sold to the appellants, money being left in the hands of the appellants to pay off incumbrances including the mortgage just mentioned. A suit was brought on foot of the mortgage and the appellants as well as mortgagors were made parties. The mortgagors did not defend the suit, but the appellants did defend it. A decree was made for the sale of the property in default of payment of: principal, interest and costs. The appellants appealed to the High Court with the result that the appeal was dismissed and the appellants were ordered to pay the costs of the appeal to the respondents. After the decision of the High Court and the expiry of the time granted for payment, the decree was made absolute and the decree-holder disregarding the terms of the decree of the High Court added to the amount of their mortgage, not only the costs of the Court of first instance but also the costs of the High Court. The property was sold and purchased by the decree-holder. We

may remark, although this is not very material, that the price was less than the price for which the property was sold to the present appellants. After the sale of the property there was a deficiency, that is to say the decree remained partially unsatisfied. The Court below in dealing with the application under Section 90 has made the original mortgagors personally liable for so much of the decretal amount as it considered to be part of the principal and interest of the original loan. The learned Judge has made the appellants liable personally for the costs in the Court of first instance and the costs of the appeal to the High Court. It is against this portion of the order that the present appeal has been preferred. Section 90 of the Transfer of Property Act provides 'when the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.' The appellants contend that if the costs in question are to be treated as a balance due upon the mortgage, then they are not personally liable as they are not the original mortgagors but merely the purchasers of the equity of redemption. The question does not arise between them and their vendors. The decree-holders were not privy to the sale to them. They further contend that there has been also a decree of the High Court for costs incurred in that Court and that being so there cannot be a second decree under Section 90. In our opinion the contention of the appellants is well-founded. The decree of the High Court clearly awards costs of that Court personally against the appellants. With regard to the costs of the Court of first instance, if they were not dealt with by the decree of the High Court they were made part of the mortgagee's costs of the original suit and are not recoverable from the appellants, except out of the mortgaged property. In the case of *Ram Lal v. Sil Chand* 23 A. 439 it was held that the word defendant 'in Section 90 means mortgagor defendant.' The result is that we allow the appeal, set aside the decree of the Court below and dismiss the application of the decree-holders as against the appellants, with costs including in this Court fees on the higher scale.