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Court : Allahabad

Decided On : Nov-12-1917

Reported in : (1918)ILR40All109

Judge : Henry Richards, C.J. and ;Pramada Charan Banerji, JJ.

Appellant : Dambar Singh

Respondent : Kalyan Singh

Judgement :

Henry Richards, C.J. and Pramada Charan Banerji, J.

1. This appeal arises under the following circumstances. A suit was brought to realize the amount of a mortgage. The property mortgaged was mortgagee rights. The facts are somewhat complicated, but it is not necessary to mention them in detail. The court of first instance decreed the plaintiff's suit. On first appeal the decision of the court of first instance was overruled and the suit dismissed. On second appeal to the High Court the decree of the first court was restored. In its judgement the High Court says:---'We must allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts. We extend the time for payment to six months.' The decree of the High Court was drawn up upon one of the High Court's forms. It states that the appeal has been allowed, the decree of the lower appellate court set aside and the decree of the court of first instance restored. It further contains the words 'and

it is further ordered that the respondent do pay to the appellant Rs. 5 4-6-9, the amount of costs incurred by the latter in this Court and in the lower appellate court.' The decree of the court of first instance which was restored by the High Court was the ordinary mortgage decree in the form prescribed, by Order XXXIV. The plaintiff applied to execute the decree of the High Court for costs personally against Dambar Singh, (the appellant in the lower appellate court and the unsuccessful respondent in the High Court). Dambar Singh objected that the costs were not payable by him personally and that the decree-holder could only obtain them by bringing the property to sale. Both courts overruled his objection. Dambar Singh comes here in second appeal.

2. There can be no doubt that, ordinarily speaking, the plaintiff in a mortgage suits gets his costs if successful against the mortgaged property and not personally against the defendant. It could not be contended that under the decree of the court of first instance (subsequently restored by the High Court) the plaintiff could get his costs personally against Dambar Singh. If the decree of the High Court had expressly followed the judgement, we do not think it could be contended that Dambar Singh was personally liable for the costs. Accordingly the respondent is driven to rely upon the words which we have quoted from the decree of the High Court. There cannot be the least doubt that there is no intimation in the judgement that the High Court intended to make Dambar Singh personally liable. It seemed almost certain that under ordinary circumstances in a case similar to this the plaintiff in a mortgage suit would add the costs incurred by him in the High Court to his costs incurred in the court below and sell the property to realize those costs. We think that we are entitled in construing the decree in the present case to consider first the nature of the suit, secondly, the judgement of the High Court upon which the decree is founded and the general practice of the Court, Considering these three matters, it seems to us quite clear that the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property. It is contended that we are bound by the actual words of the decree itself and we are not entitled to consider any other matter. The very same question seems to have arisen in the case of *Maqbul Fatima v. Lalta Prasad* (1898) I. L. R., 20 All., 523. In that case a decree which had been drawn up in

accordance with the requirements of Section 88 of the Transfer of Property Act contained a further clause that the defendant should pay to the plaintiffs a sum of Rs. 876, the amount of costs incurred by them. The majority of the Court, held that the costs could not be recovered personally against the defendant and that the Court in construing the decree was entitled to consider the terms of the judgement. The same point seems to have arisen in an unreported case Execution Second Appeal No. 871 of 1900 E. S. A. No. 871 of 1900, decided on the 28th June, 1902. Stanley, C. J., and Aikman, J.-This is an appeal by a judgement-debtor against the orders of the two lower courts. The decree-holder obtained a decree for sale on foot of a mortgage. An appeal was taken to the District Judge and the District Judge affirmed the decree of the lower court and dismissed the appeal with costs. In the decree, in addition to the dismissal of the appeal with costs, there are the two following directions, namely that the appellant do pay to the respondent the sum of Rs. 225, the amount of costs incurred by him in this court and that the defendants do pay to the plaintiff the sum of Rs. 538-2-0, the costs incurred by him in the lower court. The costs incurred in the court of first instance were by the order of that court properly added to the plaintiff's demand and the property directed to be sold in default of payment of principal, interest and costs. It was therefore entirely unnecessary for the District Judge to have ordered payment by the defendants of, this sum which had already been provided for by the decree of the court of first instance. The decree-holder applied for execution in respect of the sum of Rs. 225, the amount of costs so awarded to him, against the property of the judgement debtor other than that which was comprised in the mortgage. This judgement-debtor objected, contending that the costs awarded against him in the appellate court should be added to the decree-holder's demand and realized out of the Mortgaged, property in the first instance. Now Section 94 of the Transfer of Property Act provides that in a case of sale under a mortgage, in adjusting the amount to be paid to the mortgagee, 'the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.' Under this Section it was the duty of the Judge to add to the mortgage money the costs of the appeal. We are asked to say that the District Judge in this case has not done so.

Both the lower courts seem to have ignored the provisions of Section 94 and allowed the execution by attachment of the property of the judgement-debtor other than the property comprised in the mortgage. We think that the true construction of the decree is that, just as in the case of the costs in the court of first instance, so in the case of the costs awarded in the lower appellate court both sets of costs should be added to the mortgage money and be payable out of the mortgaged property in the first instance and not that a personal decree for these costs was intended. In regard to a small sum of Rs. 64, the judgement-debtor also appealed. In regard to this sum the appeal has not been pressed. So far as regards the sum of Rs. 225, we allow the appeal. But as regards the sum of Rs. 64, the appeal is disallowed. The parties are to pay and receive the costs of those proceedings both before and in the courts below proportionate to their failure and success when two Judges arrived at a similar conclusion. We have been referred to the case of Muhammad Sadiq v. Ghous Muhammad (1913) 11 A. L. J., 975 and also to the case of Bansgopal Singh v. Rup Narain Singh (1913) 19 Indian Cases. 384. In the first case an authority was relied upon by the learned Judge which has since been dissented from. The other case seems to turn upon the particular facts of the case and the view which the learned Judge, sitting alone, took as to the construction of the decree. If these cases are inconsistent with the Full Bench decision and the decision of the Divisional Bench we are bound to follow the latter. While we decide in favour of the appellants, we think it right to say that the form used by the High Court is not strictly correct as applied to mortgage suits. Order XL, rule 35, prescribes what a decree of the appellate court shall contain, and it would seem that it is more accurate that in mortgage suits where it is the intention of the court that the costs should be recoverable out of the property and not personally against the party, the decree of the High Court should so state. It perhaps may also be considered whether in mortgage suits in which the High Court is making a decree for sale the High Court's decree instead of merely being a dismissal or affirmation of the decree of the lower court, should not be in the form prescribed by Order XXXIV directing the property to be sold and stating the amount which is to be recovered from the property including costs. In a recent Full Bench case it was decided that the High Court's decree in a mortgage suit is the decree which is to be subsequently made absolute, and not the decree of the court below. We wish

also to say that we do not desire to be understood as holding that it is not open to the court in mortgage suits to provide in its decree, under special circumstances, that costs are to be paid personally by a party instead of being recovered as part of the mortgage-debt. We allow the appeal, set aside the orders of both the courts below and dismiss the application for execution with costs in all courts.

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