

Sampat Rai Vs. Ram Pershad

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Court : Allahabad

Decided On : Nov-14-1912

Reported in : 17Ind.Cas.517

Judge : Chamier, J.

Appellant : Sampat Rai

Respondent : Ram Pershad

Judgement :

Chamier, J.

1. This was a suit for redemption of a mortgage made in March 1908. The sum advanced was Rs. 900. The arrangement was that the mortgagor would pay the mortgagee twelve annual instalments of Rs. 100 and a thirteenth instalment of Rs. 50. In default of payment of any instalment, the whole was to become due with interest at two per cent. per mensem compounded yearly. The plaintiff, who purchased the property from the mortgagor in June 1910, sent the mortgagee Rs. 300 in September 1910 which the mortgagee accepted. The plaintiff followed this up with a tender of Rs. 950 in full discharge of the mortgage. This was refused and the present suit was brought on October 1st, 1910, the plaintiff paying Rs. 950 into Court. The first Court held that the mortgagee had waived his right to insist upon the penal clause and made a decree accordingly. On appeal, the District Judge held that there had been no waiver and he made a decree for redemption on

payment of the principal sum with interest at two per cent, per mensem compounded yearly up to the date of suit and thereafter at the rate of 12 per cent. per annum. In this appeal, the first point taken is that the mortgagee must be deemed to have waived his right to insist on the penal clause. In my opinion, no waiver has been proved in this case. Before the mortgagee received the sum of Rs. 300, he had indicated in Court an intention to insist upon enforcing the penal clause. The plaintiff, when sending the money to the mortgagee, did not say that he was sending it on account of the first three instalments. He merely sent it on account of the mortgage. It cannot be held that the mortgagee, by accepting the money, waived his rights under the mortgage. The next point taken is that the amount of compensation awarded is unreasonable. In my opinion, it is most unreasonable to award, as the District Judge has in the present case, compensation at the rate of five times the interest originally agreed upon. But I cannot interfere. The question what is reasonable compensation is a question of fact. It was treated as a question of fact by the Madras High Court in *Annamalai Chetty v. Veerabadram Chetty* 26 M. 111. The question is not unlike that considered by this Court in *Musammatt Dhuman v. Syed Abdulla Khan* 6 A.L.J. 331; 31 A. 333; 1 Ind. Cas. 760. The next point taken is that the lower Appellate Court should not have allowed on taxation the fee paid to the mortgagee's Pleader in the Court of first instance. The respondent does not resist the contention that this sum should be struck out. It is quite clear that the fee was paid long after the first hearing of the suit. The last ground of appeal fails in view of my decision that waiver has not been established. The result is, that this appeal is allowed in part. The amount of fee paid to the respondent's Pleader in the Court of first instance will be struck out. The parties will pay and receive costs in proportion to failure and success.