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Timmu Vs. Deva Rai

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Court : Chennai

Decided On : May-08-1882

Reported in : (1882)ILR5Mad265

Judge : Charles A. Turner, Kt., C.J. and ;Muttusami Ayyar, J.

Appellant : Timmu

Respondent : Deva Rai

Judgement :

1. Notice was issued to the appellant to show cause why she should not furnish security for the costs of the appeal.

2. She did not appear, and an order was made requiring her to furnish security on or before the 11th November.

3. The order was not served on her, nor on her vakil, nor is it shown she had any notice of it until the 17th January, the date on which the appeal came on for hearing. An objection was then taken that inasmuch as the security had not been furnished within the time prescribed the appeal must be rejected.

4. The Code empowers the Appellate Court to demand security and directs the Appellate Court to reject the appeal if the security is not furnished within the time the Court orders. v

5. To justify the rejection of the appeal there must have been a demand on the part of the Court.

6. The issue of a preliminary notice to show cause is not tantamount to a demand. It simply informs the appellant that the Court proposes to consider the propriety of demanding security from him and offers him the opportunity of showing cause to the contrary. A Court is not bound by the Code to issue such a notice, though in practice it would generally be improper to make an order for security without affording the appellant the opportunity of contesting it. Where such notice is given the appellant is not bound to appear. He may allow the application to be decided in his absence. If he does not appear, and the order is not made in his presence, he must have due notice of it to constitute a demand. The order directing the appellant to furnish security must be served either on him or on his vakil. It would be unreasonable to hold that he was in contempt or disobedience of an order which had not been communicated to him. For these reasons we overrule the objection and proceed to dispose of the appeal.

7. The land in suit was hypothecated to the appellant in June 3rd, 1861, to secure the repayment of Rs. 2,000 with interest at 12 per cent. after two and within four years from its date. The instrument of mortgage was not then, nor has it subsequently been, registered. Some payments on account of interest were from time to time made, and on the 24th March 1868 a payment was made of 52 1/4 rupees and an endorsement entered on the mortgage instrument and signed by the mortgagor and mortgagee to the effect following:

For six years nine months and twenty-one days the interest on the principal amount of the document is Rs. 1,021-4-0. Of this amount received up to date Rs. 469. Received in cash to-day Rs. 52-4-0. Total Rs. 521-4-0. The balance of interest after deducting the amount is Rs. 500, the principal being Rs. 2,500. It is agreed that this total sum, together with interest at 7i per cent., shall be paid on 30th Ashvija Vibhava, 15th October 1868.

8. The property was again mortgaged on January 11th, 1873, to a Mr. Rozario; that mortgage was registered under Act VIII of 1871. Suit was brought on it and a decree obtained July 2nd, 1879, and the property was purchased by the fourth

defendant whose sale certificate was registered under Act III of 1877. On the 3rd September 1879 the appellant instituted this suit to recover the amount of the mortgage debt due to her. It was pleaded inter alia that the suit was barred by limitation and that the fourth defendant had acquired an indefeasible title by purchase under a deed of mortgage, which being registered was entitled to priority over the appellant's mortgage.

9. As to the plea of limitation there is oral evidence which would prove payment of interest if it be accepted. Although the debt may be secured on immoveable property, proof of the payment of interest to bring the case within Section 20 of the Limitation Act would be sufficient.

10. As to the plea founded on the Registration Act, assuming that Section 50* would have given priority to the second mortgage, it would have given no more than priority, and the claim of the first mortgagee would not be defeated by a sale made in execution of a decree to which he was no party.

11. We must, therefore; set aside the decree and direct that the plea of limitation be retried and the issues affecting the merits be disposed of. The costs of this appeal will abide and follow the result.

* Registered documents relating to immoveables, of which the registration is optional, to take effect against unregistered documents.

[Section 50:-Every document of the kinds mentioned in clauses (1) and (2) of section eighteen, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Explanation.-In cases where Act No. XVI of 1864 or Act No. XX of 1866 was in ' force in the place and at the time in and at which such unregistered document was executed, 'unregistered' means not registered according to such Act, and, where the document is executed after the first day of July 1871, not registered under this Act.]

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