Maha Pershad Singh and ors. Vs. Surendra Mohan Singh and ors.

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Court : Kolkata

Decided On : Dec-05-1908

Reported in : 4Ind.Cas.56

Judge : Mitra and ;Caspersz, JJ.

Appellant : Maha Pershad Singh and ors.

Respondent : Surendra Mohan Singh and ors.

Judgement :

1. On the 12th February 1906, the plaintiffs-respondents obtained against the defendants-appellants and certain other persons a decree nisi on a mortgage, dated the 21st, December 1896. The operative part of the decree runs thus: 'The defendants do pay within 6 months from the date of the decree to the plaintiffs Rs. 5,36,038-11-6 principal, interest and compound interest at the rate mentioned in the bond sued upon, i. e. Rs. 7-8 per cent. per annum from the date of institution, i.e., 20th June, 1904, to date of realisation and Rs. 7,990-8 as costs of the suit besides interest at 6 per cent. per annum from the date of decree to that of realisation: that in the event of non-payment, the mortgaged properties will be sold for the realisation of the decretal amount: that if the sale proceeds of the mortgaged properties be not sufficient, the Sudha Bharna property of defendant No. 2 will be sold by auction.' No payment was made within 6 months and an order absolute for sale was made on the 31st August 1906. The decree was affirmed by this Court on appeal on the 3rd April 1907.

2. The decree nisi dated the 12th February, 1906, was not in proper form and no decree following the order absolute for sale was drawn. The attention of this Court also was not drawn to the defect by either party.

3. The plaintiffs-respondents have now applied for execution of the decree by sale of the mortgaged properties. They have calculated interest and compound interest at the bond rate, i. e., Rs. 7-8 per cent. per annum in ascertaining the amount payable under the decree. The contention of the defendants-appellants is that the plaintiffs are not entitled to any interest after the 12th August, 1906, the date when the period of grace expired and they say that the words 'date of realisation' in the preliminary decree mean the date when the amount was payable under the decree and not the date of actual realisation of that amount.

4. The lower Court relied on a distinction between the word 'realisation' used in the ordering portion of the judgment of that Court, dated the 12th February, 1906, and the words 'date of realisation;' but it seems to us that the distinction is one without a difference. In our opinion, the ordering portion of the judgment throws no light on the question of the construction of the decree.

5. The words used in the decree are admittedly vague and the difficulty in construing the decree is greater as no account was prepared to ascertain what was the amount payable on a computation of interest and compound interest up to the 12th August 1903. The amount was left to be ascertained by the decree-holders when and if they applied for execution. There is also no specification as to the rate of interest payable after the mortgage, being extinguished, became merged in the decree.

6. If, it were within our province to direct a fresh decree to be drawn up, we would have followed the decision of the Judicial Committee in Sundar Koer v. Rai Sham Kishen 34C. 150 (P.C.); 4 A.L.J. 109; 4 C.W.N. 249; 5 C.L.J. 106; 16 M.L.J. 48; 9 Bom. L.R. 304; 2 M.L.T. 75 which, affirmed the decision of this Court in the same case, Rameswar Prosad Singh v. Rai Sham Kishen 29 C. 43 and directed that an account be taken of what was due to the plaintiffs for principal and interest at Rs. 7-8 per cent. per annum with rests according to the stipulation in the mortgage and costs up to the 12th August 1906, and we would have further directed that if the

amount so found due were not paid by that date, interest would run on the consolidated amount at 6 per cent. per annum until actual realisation. But we are precluded from doing so in the execution proceedings. We can only construe the decree without adding to or subtracting from it, though the plaintiffs may yet take the necessary steps to have a proper decree drawn up by a tribunal competent to do so.

7. The prevailing practice in this province is to allow interest at the contract rate up to the date fixed for payment by the decree nisi and thereafter interest at the usual Court rate of 6 per cent. per annum and 'the date of realisation' is understood generally to mean the date fixed for payment and not the date of actual payment by the mortgagors on realisation by execution sale, though occasionally words are imported to signify the date of actual realisation. The practice of awarding interest at the bond-rate up to the date of the expiry of the period of grace and subsequent interest at 6 per cent per annum was universal before the decision of the Judicial Committee in Maharaja of Bhartpur v. Rani Kanno Dei 23 A. 181; 28 I.A. 35 and that practice was followed by this Court in Rameswar Prosad Singh v. Rai Sham Kishen 29 C. 43. The recent ruling of their Lordships of the Privy Council in Sundar Koer v. Rai Sham Kishen 34C. 150 (P.C.); 4 A.L.J. 109; 4 C.W.N. 249; 5 C.L.J. 106; 16 M.L.J. 48; 9 Bom. L.R. 304; 2 M.L.T. 75. justify an adherence to the old established practice of this Court. It does not appear to us that the Court which framed the decree intended to deviate from this practice. We must, therefore, hold that the words 'date of realisation' in the decree mean the date fixed for payment by the decree, that is, a date within and not after the period of grace.

8. It is manifest that the Court ommitted to give any directions in the preliminary decree as to subsequent interest. The defect could and ought to have been cured by the final decree absolute for sale, but none was drawn up and the plaintiffs failed to ask the Court to draw up a decree.

9. We are, therefore, of opinion that the amount for which execution by sale should issue, should be calculated by giving interest at the stipulated rate up to the 12th August 1906, the computation being based on the principal amount specified in the mortgage and not the sum of Rs. 5,36,368-11-6, the amount sued for.

10. We make no order as to costs either in this Court or the lower Court.