APPELLATE CIVIL.

Before Mukerji and S. K. Ghose JJ.

1935

June 18, 26.

BRAJENDRAKUMAR DATTA RAY

v.

SHUSHEELCHANDRA CHAKRABARTI.*

Mortgage suit—Interest greater than principal, when recoverable—Change of law pending appeal—Retrospective effect—Bengal Money Lenders Act (Beng. VII of 1933), s. 4.

The question whether a statute is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively unless it is clear that such was the intention of the legislature.

Quilter v. *Mapleson* (1) explained.

There is nothing either in section 4 or in any other section of the Bengal Money Lenders Act of 1933 to indicate that any retrospective operation to section 4 of the Act was intended.

In a mortgage suit in a *mofussil* court, decided on the 8th of August, 1931, interest was decreed to the plaintiff beyond the amount equal to the amount of the principal. During the pendency of the appeal from that decree in the High Court (the appeal having been filed in 1932) the Bengal Money Lenders Act of 1933 was passed and it came into operation on the 1st of July, 1934.

Held that section 4 of the Act was not applicable.

Ram Ratan Sahu v. *Bishun Chand* (2); *Ramyad Sahu* v. *Bindeswari Kumar Upadhay* (3); *Rai Charan Mandal* v. *Biswa Nath Mandal* (4) and *Suresh Chandra Chatterjee* v. *Kanti Chandra Bhattacharjee* (5) distinguished.

APPEAL FROM ORIGINAL DECREE by the defendant.

The material facts of the case and the arguments in the appeal appear in the judgment.

Jateendranath Sanyal and *Bhupendrakishore Basu* for the appellant.

*Appeal from Original Decree, No. 83 of 1932, against the decree of Amulyagopal Ray, Fourth Subordinate Judge of Dacca, dated Aug. 8, 1931.

(1) (1882) 9 Q. B. D. 672.
(2) (1907) 11 C. W. N. 732.
(3) (1907) 6 C. L. J. 102.
(4) (1914) 20 C. L. J. 107.
(5) (1928) 47 C. L. J. 530.

Atulchandra Gupta and *Hemendranarayan Bhattacharjya* for the respondents.

Cur. adv. vult.

The judgment of the Court was as follows:—

This is an appeal by one of the defendants from a decree for sale, which the plaintiff has obtained on a mortgage-bond. The plaintiff's case was that the defendant and his three brothers and also their mother executed the bond on the 7th *Poush*, 1323 (22nd December, 1916) and borrowed Rs. 5,500 at an interest of 14 annas per cent. per annum compound with six monthly rests, in order to pay off two earlier mortgages on some of the properties covered by this bond; that these two mortgages were one dated 17th *Mâgh*, 1323 (31st January, 1916) for Rs. 2,000 in favour of one Taranath Mitra bearing interest at 12 annas per cent. per annum and another dated 12th *Fâlgun*, 1323, (24th February, 1916) for Rs. 1,800 from one Kunja Chakrabarti bearing interest at 10 annas per cent. per annum; and also that he had received two sums, namely, Rs. 613-2 and Rs. 1,365 on account of interest due, the former through one Jogendra Chakrabarti, brother of Kunja Chakrabarti, and the latter through one Manmohan Moulik, *mukhteâr* of the Bhawal Estate. The Bhawal Estate were the purchasers of one of the mortgaged properties, which was sold to them by the mortgagors with the consent of the plaintiff. The claim was laid at the balance due at the date of the suit, namely, Rs. 15,932-9 *as.*-10 *gandâs.*

The principal defendants in the suits, of whom the appellant was one, were the mortgagors or their heirs, and the other defendants were subsequent transferees of portions of the mortgaged properties. The defence of the appellant and of the other contesting defendants introduced a long and complicated story. Shortly put, the story was as follows:—The plaintiff, at the time of the

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mortgage, paid only Rs. 1,433 in cash out of the amount of consideration, which was stated in the bonds, *viz.*, Rs. 5,500, and retained the balance Rs. 4,067 to pay off the two earlier mortgages. In 1324 B.S., the appellant was given an appointment by the plaintiff's father as an officer in his employ. In November, 1917, the mortgagors sold away their moveables, including furniture, ornaments, cattle, *etc.*, and, out of the sale proceeds, paid off Taranath's mortgage and, on the 22nd December, 1922, deposited in court, for paying off Kunja Chakrabarti's mortgage, a sum of Rs. 1,923-12 *as.* Kunja Chakrabarti did not accept the amount so deposited, as it was short by a small amount, and eventually a creditor of his attached and realised Rs. 129-14 *as.* Out of this deposit, a balance of Rs. 1,793-14 *as.* was thus left. On the 20th March, 1923, a part of the mortgaged properties was sold with the plaintiff's consent, and this sale fetched Rs. 4,365, out of which Kunja Chakrabarti was paid Rs. 3,000, leaving a balance of Rs. 1,365. These two amounts of Rs. 1,793-14*as.* and Rs. 1,365, making a total of Rs. 3,158-14 *as.*, was paid to the plaintiff on that date, of which Rs. 1,978-2 *as.* was credited to his dues on the mortgage, and the balance Rs. 1,180-12 *as.* was paid to him in satisfaction of his dues on certain pro-notes and for certain other charges. Taking the principal amount of the mortgage as Rs. 1,433 and giving credit for Rs. 1,978-2 *as.* then received, the dues on the mortgage on the 20th March, 1923, was found to be Rs. 481-12-6 which, however, the plaintiff's father promised to remit. The plaintiff's father eventually refused to grant the remission and so the appellant left his service.

Other defences were also taken: want of legal execution and attestation; penal and unconscionable rate of interest; paramount title; maintainability of the suit, *etc.*

The judge has overruled all the defences and, accepting the plaintiff's case, has made a decree.

The first and most important question in the appeal is whether Rs. 5,500 was lent in cash or only Rs. 1,433 was paid in cash, the balance Rs. 4,067 being retained for clearing off the prior mortgages. On this question, considerable reliance was placed upon the words of the bond, which, after reciting the two prior mortgages and saying that it was necessary to borrow Rs. 5,500 for paying them off and also for other needs of the mortgagors, stated :—

> We, on keeping alive the rights under both the aforesaid mortgages, * * * * borrow from your *tahabil* to-day the sum of Rs. 5,500.

It has been argued that this stipulation shows that the dues on these earlier mortgages must have been retained and that no prudent mortgagee would, if he intended to keep alive his rights under the previous mortgages, in such circumstances, have consented to allow the mortgagors to take the money for paying off the earlier mortgages. We are unable to see that the recital referred to above indicates any such thing. Nor are able to hold that the story that the plaintiff trusted the mortgagors and left it to them to pay off the earlier mortgages is a story which is so improbable that it is intrinsically unacceptable. It is true that it would be to the interest of the mortgagees to see that the previous mortgages were paid off, but, having regard to the fact that the appellant was soon after taken in the employ of the plaintiff's father, it was not an impossibility on the part of the plaintiff's father to be a bit indulgent to the mortgagors so that they might settle their own terms with the prior mortgagees as regards their satisfaction.

It has been next argued that there is no clear statement in the bond showing that the whole amount of Rs. 5,500 was received in cash, and so it should be presumed that a part of it must have been retained. This contention, in our opinion, is unfounded, because the recital is that the amount was being taken out of the *tahabil*. Such a statement can only mean a cash transaction. On arguments such as these, and so lightly, the question cannot be decided in favour

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of the appellant. It appears that in the appellant's written statement, in which his story is carefully and in every detail set out, he made a case that when on the 20th March, 1923, the two payments of Rs. 1,365 and Rs. 1,793-14 *as.* were made, it was agreed that both the sums would be credited against the principal of the debt and that this agreement was violated. The learned judge has rightly pointed out that a sum of Rs. 1,433, which, according to the appellant, was the principal amount of this mortgage, would not admit of a credit of Rs. 3,158-14 *as.*, even if interest at the full rate in the bond is taken into account. If the plaintiff had withheld the amount due on the prior mortgages, it is extremely unlikely that he should have delayed so long in paying them off, for the debts were running against him and there is no suggestion that he was in want; the evidence, on the other hand, being that the plaintiff's father was a rich man and had a good deal of money-lending. It is not explained why if so much as Rs. 4,067 was being withheld and only Rs. 1,433 was being paid, no mention whatever of that fact was made in the bond itself. The appellant's story is that when he had to sell the movables, *etc.*, as the plaintiff's father, contrary to the agreement, did not pay off the earlier mortgages, he complained to many persons including the plaintiff's father himself. This is palpably false: nobody has corroborated him, and the fact that he continued in his service belies the statement. Is it conceivable that he and the other mortgagors would all remain quiet if they were being cheated in this way? Clearly, no. This strange conduct on their part has been sought to be explained before us by suggesting that the appellant was in the service of the plaintiff's father and so the mortgagors had to put up with the treatment they were receiving. This explanation, to our mind, is unacceptable. It should be remembered that the appellant's story means that not only was the plaintiff's father playing them false, but that they had to sell their all and become paupers in order to pay off the earlier mortgages. It is not suggested

that when the earlier mortgages were paid off any reference was made by those mortgagees to the plaintiff or his father; a fact which makes it exceedingly likely that the plaintiff and his father left it to the mortgagors to settle their own terms with those mortgages. The probabilities, such as they are, are decidedly against the appellant's story.

As regards the actual evidence in the case, a good deal of criticism has been levelled on behalf of the appellant against the direct testimony that there is as regards the passing of the consideration of Rs. 5,500. There may be a doubt as regards the presence of P. W. 6 Phaneendrachandra Chakrabarti at the time when the payment was made, but we see no reason to distrust the other evidence that is there of it. A large body of evidence has been adduced on behalf of the defendants to show that the movables, *etc.*, were sold in order to raise money wherewith the earlier mortgages were eventually paid off. We do not regard this evidence as credible, as regards the items that were sold and the prices they fetched. This evidence gives an account which to our mind seems considerably exaggerated. The learned judge has referred to this evidence in detail and we do not consider it necessary to deal with it here. On the whole, we feel no difficulty in endorsing the conclusion, which the learned judge has come to and recorded in these words:—

> Conceding that all this evidence was true and that from this money Rs. 2,200 was paid to Taranath and Rs. 1,993 (should be Rs. 1,923-12*as.*) was deposited in the name of Kunja, still this does not disprove the plaintiff's case that the whole of Rs. 5,500 was paid to the defendants at the time of the bond. It is quite possible that the defendants spent the money—if not all—otherwise, and then raised more by sale of movables. The great delay tends to show that some such thing must have happened.

Some comment has been made on behalf of the appellant on the ground that the plaintiff's father was not examined though he was alive for nearly eighteen months after the institution of the suit, that the *jamâkharach* book has not been produced and some such other matters. We do not think it was necessary for the plaintiff to examine his father when the

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other evidence that he produced was not inadequate or unconvincing. As regards the non-production of the *jamâkharach*, the learned judge has sufficiently dealt with it.

Of the other defences taken, the question of paramount title has been left open and the other questions have all been decided against the defendants. The only other question amongst these that has been argued before us is the question of interest. This question has been raised before us in a different shape from that in which it was presented in the court below. There it was alleged that the provision as regards compound interest was fraudulently inserted and that the rate was penal and unconscionable. The court overruled these objections and held further that the bond being of a date prior to 1918, the Usurious Loans Act (Bengal Act X of 1918) did not apply. Here, reliance has been placed upon section 4 of the Bengal Money Lenders Act (Bengal Act VII of 1933) and it has been contended that that section, by its retrospective operation, would disentitle the plaintiff to any interest beyond an amount equal to the principal of the loan.

The decision of the court below was passed on the 8th August, 1931. It is, therefore, undisputed that the decision was in accordance with the law as it then was. The appeal was filed on the 23rd November, 1931, and has since remained pending. While it has been so pending, Bengal Act VII of 1933 was passed and came into operation on the 1st July, 1934. If the appeal had been disposed of on any date prior to the date last mentioned the contention would have been out of the question. The argument of the appellant involves the position that because the appeal has, for congestion in the business of this Court, remained pending, the plaintiff respondent has to lose some five thousand rupees. The appellant says that this cannot be helped because the Act has made such change in the law as we are bound to take notice of and to apply to the case even at this stage.

Now, we do not find either in section 4 itself or in any other section of the Act anything which would indicate that any retrospective operation to the section was intended. And, in our opinion, the argument is entirely misconceived when it speaks of "retrospective operation". The real question is whether at this stage, at the hearing of the appeal, the law which came into force during the pendency of the appeal on the 1st July, 1934, is to be applied to the case. One difficulty of answering this question in the affirmative is that, according to the section, the court shall limit the amount "unless it is satisfied that "the money-lender had reasonable grounds for not "enforcing his claim earlier". To deal with this proviso, therefore, an issue of fact will have to be decided necessitating an investigation into facts. To hold in favour of the appellant would mean that in all cases as regards interest pending in First or Second Appeal or on appeal to the Judicial Committee, a remand or at least a further investigation would have to be made. It is hardly conceivable that such was ever the intention of the legislature.

A number of decisions have been cited before us on behalf of the appellant as supporting his contention that the law, such as it now is, should be applied to the case. Of these those that are said to have any bearing on the contention will now be noticed. *Ram Ratan Sahu* v. *Bishun Chand* (1); *Ramyad Sahu* v. *Bindeswari Kumar Upadhay* (2) and *Rai Charan Mandal* v. *Bisua Nath Mandal* (3) do not assist us because they merely say that facts and events subsequent to the filing of the appeal may, and sometimes should, be taken notice of where by adopting that course litigation may be shortened, ends of justice attained or rights of parties preserved. In *Suresh Chandra Chatterjee* v. *Kanti Chandra Bhattacharjee* (4), this proposition was applied to a case in which in an action for ejectment the tenant

(1) (1907) 11 C. W. N. 732.
(2) (1907) 6 C. L. J. 102.
(3) (1914) 20 C. L. J. 107.
(4) (1928) 47 C. L. J. 530, 533-4.

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was held by the trial court protected by a temporary Act, namely, the Calcutta Rent Act of 1920, but during the pendency of an appeal from that decision that Act expired and in the appeal ejectment was ordered which could be justified under the general law as between the landlord and tenant. It was held that—

> If the right claimed is one which has either "ceased to exist or been modified by certain events which have transpired since the decree of the trial court the court is bound to take notice of it in order to give just and proper relief to the parties to the appeal before it".

It should be noted that if this view was not taken, and if the appeal was disposed of on the ground that the trial court had applied the law as it then was the only result would have been that though the plaintiff failed to get ejectment on the ground that the temporary Act gave the tenant protection, he would be entitled to get the relief in a fresh suit which he would institute afterwards. To shorten the litigation and prevent an unnecessary suit the fact that the temporary Act had ceased to operate was taken notice of. In *G. Kanakyya* v. *Janardhana Padhi* (1), the real question was the meaning of the word "final" used in connection with a decree under a certain Act; and, it being held that it meant a decree which was not under appeal or was not liable to be set aside or modified on appeal, certain rights provided for by the Act in such circumstances were allowed. In the case of *T. Muthuswami Ayyar* v. *Kalyani Ammal* (2) the relevant facts were that a suit had been dismissed by the trial court, and, after the plaintiff had taken an appeal from the trial court's decision, an Act was passed which was by nature a declaratory one and had retrospective effect; and, relying on it, the appellate court held that the plaintiff had no right to sue and so dismissed this appeal. This decision was upheld by the High Court holding that the Act was restrospective in its operation and the appellate court was entitled to take cognizance of it at the appellate

(1) (1910) I. L. R. 36 Mad. 439. (2) (1916) I.L.R. 40 Mad. 818.

stage. This, therefore, was a case in which if the contrary was held, a plaintiff, who was unsuccessful in getting a decree from the trial court, would have got a decree from the appellate court even though he had no right to such a decree at the date on which he was getting it. These cases, in our judgment, are all distinguishable from the present case and are of no assistance to us on the question we are now considering.

On behalf of the appellant, considerable reliance has been placed upon the decision in the case of *Quilter* v. *Mapleson* (1). In that case it was held that the right given by the Conveyancing Act of 1881 to obtain relief against forfeiture could be claimed in a suit which had been instituted and tried at first instance before that Act came into operation. Jessel M. R. first of all referred to the general proposition that is applicable to such cases. He observed—

> The question whether an Act of Parliament is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively unless it is clear that such was the intention of the legislature.

The expression "the provisions of the Act" itself should be understood in an enlarged and not a limited sense as had been explained by Lord Hatherley in an earlier decision, namely, the case of *Pardo* v. *Bingham* (2) thus,—

> Baron Parke did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was, whether the legislature had sufficiently expressed that intention. In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the legislature contemplated.

Then it was held that if the Act was not given a retrospective operation and if it was held that it did not apply to breaches committed before it came into operation, the effect would be to take away from the tenant a right of relief against forfeiture similar to what the Act itself gave him, and which he had under

(1) (1882) 9 Q. B. D. 672. (2) (1869) L. R. 4 Ch. 735, 740.

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a previous Act, namely, the Common Law Procedure Act, 1852, but which was now lost to him, as the earlier Act was abrogated by that Act.

It was next held upon a certain consideration arising out of the wording of a particular section of the Act and on comparing it with the earlier enactment that the Act was intended to apply to pending proceedings. In other words, it was held that, although the Act was not in existence at the date of commencement of the action, the provisions were to be applied to the action which was pending.

Lastly, it was held that even though the trial at first instance was over, the appeal court was entitled to apply the Act to the case. It will be noticed, if the judgments in the case are carefully pursued, that considerable stress was laid, as regards this part of the decision, on the fact that, although a judgment had already been given before the Act was passed and the landlord might have obtained possession, he had not re-entered, but execution had been stayed to give the tenant time to appeal and no possession had been delivered. And putting the provisions of the Act together it was held that the tenant was entitled to the relief so long as the landlord had not taken possession.

There is nothing in the present case similar to the conditions in the case just discussed. The appellant's contention, in our judgment, is not well-founded.

We think the decree which the court below has passed is right. The appeal is dismissed with costs.

The days of grace will be extended by six months from to-day.

Appeal dismissed.

A. K. D.