

1909

MARI-ULLAH  
KHAN  
v.  
BANWARI  
LAL.

1909  
December 8.

The Court will take such additional evidence as may be necessary. On receipt of its findings ten days will be allowed for filing objections.

*Issues remitted.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
HAR DAYAL AND OTHERS (DEFENDANTS) v. PIRTHI SINGH (PLAINTIFF).  
*Act No. IV of 1882 (Transfer of Property Act), section 83—Deposit paid to mortgagee—Balance of mortgage debt promised—Mortgage not discharged.*

The consequences resulting from a payment into Court under section 83 of the Transfer of Property Act, 1882, only occur when the amount paid in is found to be or is accepted by the mortgagee as being equivalent to the full amount due under the mortgage in suit.

THE respondent brought a suit upon a mortgage dated the 17th of December, 1886, executed by the first set of the appellants. The bond was for Rs. 1,300 and provided payment with compound interest at Re. 1-4-0 per cent. per mensem. He impleaded as defendants the mortgagors and certain purchasers of half the mortgaged property from the mortgagors under a sale deed dated the 20th of April, 1894. In July, 1895, they deposited Rs. 2,725 in court under section 83 of the Transfer of Property Act, 1882, for payment to the mortgagee, respondent. In reply to this application, the respondent stated that Rs. 4,591-0-3 were due to him up to date and said :—

“ He has deposited Rs. 2,725 for the opposite party and has shown his readiness to pay the remaining amount that may be found due according to account. It is therefore prayed that the said amount may be paid to the opposite party and the applicant be directed to pay the remaining dues to the opposite party under the said bond. The opposite side has no objection to take the whole account of the said bond, viz., Rs. 4,591-0-3, and return the said bond. The sum of Rs. 2,725 which the applicant has deposited for the opposite party may be paid to the opposite party. The opposite party will enter the payment of this sum on the reverse of the said bond. If the remaining amount is not paid to the opposite party he will seek his remedy in due course from the court.”

Thereupon the pleader for the applicant stated :—

“ The money due to the opposite party is not so much as he states. The applicant has deposited Rs. 2,725. That sum may be paid to the opposite party. As for the rest, the opposite party can seek his remedy in court. The vendor had left only that sum with my client for payment to the opposite party.”

The following order was then made by the court :—

“ That the amount deposited in the court be made over to the mortgagee and the mortgage deed be returned after noting the payment of the amount with

\* First Appeal No. 89 of 1906 from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 21st of January, 1906.

reference to the account of the amount of the mortgagee, that this case be struck off the file of pending cases, without discussing any of the points at issues between the parties."

The claim was for Rs. 10,000 including interest and was decreed by the court below.

The defendants appealed.

Mr. A. H. C. Hamilton (with him Maulvi *Shafi-uz-zaman*) for the appellant :—

The withdrawal of the money deposited under section 83 of the Transfer of Property Act, 1882, is subject to the conditions prescribed by that section, namely, that it should be accepted as in full discharge of the bond. I rely upon *Ram Chandra v. Keshobati Kumari* (1) and *Manzur Ali v. Mahmud-un-nissa* (2). In any event, the plaintiffs are not entitled to interest on the principal amount from the date of deposit. I rely upon *Anandi Ram v. Dur Najaf Ali Begum* (3). The interest claimed is penal, see *Sunder Koer v. Rai Sham Kishen* (4).

Certain questions of fact were also argued.

Pandit *Baldeo Ram Dave* (for the Hon'ble Pandit *Sunder Lal*), for the respondent, was not called upon.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for sale upon a mortgage executed by the first two defendants in favour of the plaintiff on the 16th of December, 1886. The amount secured by the mortgage was Rs. 1,300. It was stipulated in the mortgage deed that interest would be paid half yearly at the rate of 15 per cent. per annum, and that in the event of interest not being paid every half year, compound interest should be charged at the same rate. The defendants 1 and 2 are the mortgagors. The defendants 3, 4, and 5 are the sons and grandsons of the mortgagors. The other defendants are purchasers of a part of the mortgaged property. It was alleged on behalf of the defendants that a sum of Rs. 600 had been paid in addition to the amount which the plaintiff admitted having received. It was also urged that the mortgage had been discharged in full, inasmuch as the mortgagee had received a sum of Rs. 2,725, which was deposited by the purchaser under section 83 of the Transfer of Property Act.

(1) (1909) 6 A. L. J., 617; s. c. 36 Cal., 840. (3) (1890) I. L. R., 13 All., 195.

(2) (1902) I. L. R., 25 All., 155. (4) (1906) I. L. R., 34 Cal., 150.

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The court below has overruled these objections and has decreed the claim in full.

The defendants have preferred this appeal, and the first contention raised before us by their learned counsel is that the mortgagee must be deemed to have received the Rs. 2,725, deposited by the purchaser under section 83 of the Transfer of Property Act, in full discharge of the mortgage. The circumstances under which the amount was received by the mortgagee are set forth in the proceedings of the court, dated the 14th of September, 1895. It appears that the mortgagee refused to accept the amount deposited in full satisfaction of the mortgage and alleged that a much larger sum was due. Thereupon the pleader for the purchasers, who deposited the mortgage money, stated that the amount deposited might be paid to the mortgagee and that for the balance, if any, the mortgagee might seek his remedy in court. It was upon these terms that the mortgagee received the money. Therefore it cannot be said that he took it in full discharge of the mortgage, as mentioned in the second paragraph of section 83 of the Transfer of Property Act. The order of the court was that the amount deposited be endorsed on the mortgage deed and that the mortgage deed be returned to the mortgagee.

It is next urged that interest on the principal should not be charged after the date of the deposit of Rs. 2,725 mentioned above. The contention has no force. If the amount due on the mortgage on the date of the deposit exceeded the amount of the deposit, interest was chargeable on the excess amount. In this case the full amount of the mortgage was due, as the account shows. The mortgagee was therefore entitled to interest on the said amount in accordance with the terms of the mortgage deed.

Another contention on behalf of the appellants is that it has been proved by the evidence that a sum of Rs. 600 was paid by the mortgagors to the mortgagee, shortly after the execution of the mortgage. The evidence consists of the statements of one of the mortgagors and of a single witness. This witness was disbelieved by the court below, and we see no reason to come to a different conclusion as to his credibility. No receipt was taken and no endorsement of payment was obtained on the mortgage deed. We are not satisfied that Rs. 600 was paid as alleged.

The only other contention, on behalf of the appellants, is that the stipulation to pay compound interest must be deemed to be a penalty. We are unable to accede to this contention, which in our opinion is wholly untenable.

These are the points raised in this appeal, and we are of opinion that none of them has any force. We accordingly dismiss the appeal with costs. We extend the time for payment of the mortgage money for a period of six months from this date.

*Appeal dismissed.*

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HAR DAYAL  
v.  
PERRI  
SINGH.

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December 10.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

TIKA RAM (DEFENDANT) v. DAULAT RAM (PLAINTIFF).\*

*Suit to set aside a decree on the ground of fraud—Personal service not effected—Conduct of plaintiff.*

The mere fact that personal service of a summons has not been effected on a defendant will not render the proceedings against him absolutely abortive. But where the non-service is due to the fraudulent conduct of the plaintiff in the suit and others acting with him, and a decree is thereby obtained, such decree may be set aside as fraudulent. *Mahomed Gulab v. Mahomed Sulaiman* (1) followed.

THE facts of the case were as follows:—

Tika Ram, the defendant appellant, obtained an *ex parte* decree against the plaintiff, Daulat, from the Court of Small Causes at Agra. When execution of the decree was taken out the plaintiff instituted the present suit to set it aside on the ground of fraud. It was alleged in the plaint that the suit in which the *ex parte* decree was obtained had been instituted at the instigation of one Jhundu Mal, who was an enemy of the plaintiff, and that the claim of the defendant had been fraudulent and that no summons had been served upon the plaintiff. The Munsif, holding that the claim of the defendant was false and that no summons had been served upon the plaintiff in that suit, set aside the *ex parte* decree. On appeal the District Judge did not go into the fact whether the claim of the defendant against the plaintiff was fraudulent or not. He simply found that the service of the summons, which purported to have been made on the person of the plaintiff, was fictitious;

\* Second Appeal No. 855 of 1908 from a decree of B. J. Dalal, District Judge of Agra, dated the 10th of August, 1908, confirming a decree of Shambhu Nath Dube, Munsif of Agra, dated the 9th of August, 1907.

(1) (1894) I. L. R., 21 Cal., 619.