APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice King.

1926
July, 1.

MAHMUD HASAN AND OTHERS (DEFENDANTS) *v.* LAUTE RAM (PLAINTIFF) AND HABIB-UR-RAHMAN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, order XLI, rule 33—Usufructuary mortgage—Suit for declaration of payment—Finding of payment, but suit for declaration time-barred—Decree to be granted—Power of Court to give relief to party who has not appealed.

Plaintiff sued for a declaration that the money due in respect of certain property usufructuarily mortgaged by him had been paid off, and his suit was dismissed. He did not appeal, but some of the defendants did; and on this appeal it was found that the plaintiff's allegation of payment was correct, but that the remedy by means of a declaration was time-barred. The Court then took action under order XXXIV, rule 9 of the Code of Civil Procedure, and directed the defendants to re-transfer the property in suit to the mortgagor plaintiff.

Held, with reference to *Rangam Lal* v. *Jhandu* (1), that the procedure adopted by the lower appellate court was right.

THE facts of the case were as follows :—

On the 28th of May, 1897, five properties were usufructuarily mortgaged by means of two deeds in favour of two ladies, Aminat-un-nissa and Ghafur-un-nissa. The money agreed to be advanced by the first-named lady was Rs. 27,500, and by the second Rs. 1,500. Under the former deed Rs. 21,200 were left with the mortgagee for paying off earlier mortgages and a promissory note was given by the mortgagee for the balance, Rs. 6,300; under the second deed Rs. 1,000 were left for satisfaction of earlier mortgages and Rs. 500 were paid in cash. None of

* Second Appeal No. 325 of 1924, from a decree of M. F. P. Herchenroder, District Judge of Saharanpur, dated the 16th of May, 1923, modifying a decree of Maulvi Muhammad Shafi, Subordinate Judge, dated the 15th of July, 1920.

(1) (1911) I.L.R., 34 All., 32.

the amounts left with the mortgagees for paying off the prior mortgages was ever paid by them.

The plaintiff asked for a declaration that the property Ibrahimpur was not subject to any charge created under the mortgage-deeds, and there was an alternative prayer that if there was any charge it was limited to Rs. 987-1-9; and there was a prayer, in its nature formal, that any other relief which, under the circumstances of the case, could be granted to the plaintiff might also be granted to him.

The matter was tried in the court of the Subordinate Judge of Saharanpur, and he came to the conclusion that only Rs. 500 had ever been paid by the mortgagees, and that this sum had been more than satisfied from the usufruct. But owing to certain *lacunae* in the evidence the court held that no redemption decree could be granted, but it found in favour of the plaintiff that the particular property had been freed from any charge upon it.

The plaintiff did not appeal, but the defendant did, and when the matter came before the District Judge of Saharanpur, he found that the items of Rs. 6,300 and Rs. 500, totalling Rs. 6,800, had been paid by the mortgagees. He went on to consider whether the mortgage as regards this particular property had been redeemed, and he came to the conclusion on taking the accounts that the mortgagees had been paid back the loan of Rs. 6,800 and that nothing was due to the mortgagees. Having reached that point he had to consider what should be done and he decided that the suit for declaration was barred by limitation. The case, therefore, was in this position that the plaintiff having asked for a declaration, which the lower appellate court found was barred by limitation, and it having been found

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in his favour that there was no encumbrance on the property, the question arose as to what, in the circumstances, was the proper thing to do.

Before the District Judge gave any decision the case stood in this way that the plaintiff had succeeded partially in the lower court; he had not raised any cross-objection nor had he appealed independently on the matter decided adversely to him, namely, redemption. The learned District Judge was of opinion that he could proceed under order XXXIV, rule 9, and that he could direct the defendants to re-transfer to the plaintiff that part of the mortgaged property which was the subject of the action. Some of the defendants appealed.

Maulvi *Iqbal Ahmad*, for the appellants.

Mr. *Nihal Chand* and Dr. *Surendra Nath Sen*, for the respondents.

The judgement of the Court (MEARS, C. J., and KING, J.), after setting forth the facts as above, thus continued :—

Looked at from any practical point of view the decision is as good as can be conceived, because the plaintiff had right upon his side from the outset. There had been a breach of contract in 1897 when the mortgagees got possession of the mortgaged property on a promise by them that they would pay the Rs. 21,200 to which we have referred above. It is common ground that they never made any attempt to pay any part of that, nevertheless they remained in possession of the whole of the property throughout. The effect of the possession was that by the date of the institution of this suit the Rs. 6,800 which had been advanced on promissory note had been completely extinguished and the plaintiff was asking in those circumstances that the property should be re-transferred to him. It is said that that cannot be done

because, having regard to the language of order XLI, rule 33, and the caution as to the application of that section which is contained in the case of *Rangam Lal* v. *Jhandu* (1), we must not in this case allow the relief which the District Judge has granted the plaintiff, because if we did so we would be acting in contravention of the provisions of order XLI, rule 22. There are, however, passages in that judgement which show that the circumstances of each particular case must be borne in mind, and at page 35 the following observations are to be found :—

"The object of rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal. Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an appeal or preferred an objection. Of such cases the illustration to the rule is a type."

Reference was made to the English case of *The Attorney-General v. Simpson* (2). In our opinion the language of order XLI, rule 33, is wide enough to support the decision of the District Judge. He very wisely chose what, in our opinion, was the proper course. He could, had he been extremely technical, have said that as the respondent had filed no cross-objection and had not independently appealed, that, therefore, he could not grant the relief to which, in his opinion, the respondent was most justly entitled. Had he done that it is possible that on a strict construction of order XLI, rule 33, we might have upheld that, but we should have held that grudgingly and taken the view that it was an unfortunate decision. This decision is in consonance with justice, equity and good conscience, and it is in

(1) (1911) I.L.R., 34 All., 32. (2) (1901) 2 Ch. D., 671.

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our opinion one which must be upheld. We, therefore, dismiss this appeal with costs.

The cross-objection is also dismissed.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Daniels.

EMPEROR *v.* RAM DEO SINGH AND ANOTHER.*

1926 *July*, 12.

Criminal Procedure Code, sections 107 *and* 112—*Security for keeping the peace—Substance of information given in summons itself, instead of in order—Irregularity.*

A Magistrate taking proceedings under section 107 *et seq.* of the Code of Criminal Procedure, instead of sending a copy of his order with the summons, gave the substance of the information in the summons itself. *Held*, that the Magistrate failed to comply with the provisions of section 112, but the irregularity was covered by section 537 of the Code of Criminal Procedure as it was not shown that the accused had been prejudiced by it. *Emperor* v. *Suleman Adam* (1) referred to.

Persons who come to the High Court in revision against an order under section 107 of the Code of Criminal Procedure are expected to do so with the utmost promptitude and certainly within thirty days of the order against which they complain.

THIS was an application in revision against an order of the second Assistant Sessions Judge of Gorakhpur. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

* Criminal Revision No. 209 of 1926, from an order of P. K. Ray, Second Additional Sessions Judge of Gorakhpur, dated the 8th of February, 1926.

(1) (1909) 11 Bom., L.R., 740.