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GAJRAJ SINGH v. MUHAMMAD MUSHTAQ ALI

Judge that simple interest at 12 per cent. per annum was a fair and commercial rate of interest.

No doubt all these cases are to be distinguished on the ground that they were not cases decided expressly under the provisions of the Usurious Loans Act; but in our opinion they furnish a sufficient guide to us for holding that *prima facie* and in the absence of special circumstances to the contrary, the rate of 12 per cent. per annum may be taken as a fair, proper and reasonable rate. The learned Subordinate Judge in this particular case has been influenced by many circumstances which were in favour of the mortgagor and has already gone to the length of holding that the proper rate of interest would be Rs.6 per cent. per annum simple. We, therefore, think that in this case a rate of 12 per cent. per annum should be considered to be a fair and proper rate and that the condition for compounding it would make it an excessive rate and transform the transaction into a substantially unfair one.

We accordingly allow this appeal in part, modify the decree of the court below and uphold the decree for payment of the principal sum but direct that it should carry interest at 12 per cent. per annum from the date of the mortgage till the date of the decree. Thereafter the usual rate of 6 per cent. per annum on the consolidated sum is allowed. We direct that the parties should receive and pay costs in proportion to success and failure.

REVISIONAL CIVIL

Before Mr. Justice Young and Mr. Justice Collister

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September, 15

MASURIA DIN (APPLICANT) *v.* MOTI LAL AND ANOTHER (OPPOSITE PARTIES)*

Civil Procedure Code, order XLIV, rule 1, *proviso—Application for leave to appeal as a pauper—Summary rejection after issue of notice to opposite party and Government Pleader—Revision—Civil Procedure Code, section* 115.

*Civil Revision No. 10 of 1933.

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MASURIA DIN v. MOTI LAL

Upon an application for leave to appeal as a pauper the court ordered notice to issue to the opposite party and the Government Pleader. The opposite party filed certain objections. Subsequently, without hearing either the applicant or any other party, the court passed an order summarily rejecting the application on the ground that there appeared no reason to think that the decree was contrary to law or was otherwise erroneous or unjust. *Held*, in revision, that the order was passed without jurisdiction. The word "shall" in the proviso to rule 1 of order XLIV of the Civil Procedure Code is mandatory and the court has no option but to reject the application unless, having read the application and the judgment, it has definitely come to the conclusion that there is a *prima facie* case to be heard. The court having once come to that conclusion and passed the necessary order issuing notice, it is *functus officio* as regards a summary dismissal. The Judge can not thereafter disregard his previous conclusion and order and dismiss the application summarily.

Mr. *V. D. Bhargava*, for the applicant.

Mr. *Rudra Narain*, for the opposite parties.

YOUNG and COLLISTER, JJ.:—This is an application in revision from an order of the learned District Judge of Allahabad.

A pauper had been unsuccessful in a case tried by the Munsif. He applied to the District Judge under order XLIV, rule 1, to be allowed to appeal as a pauper. The learned Judge issued notice upon this application to the opposite party and to the Government Pleader. Thereafter it appears that he decided the application summarily without hearing either of the parties to whom notice had gone or the pauper himself. The order was as follows: "Having carefully perused the judgment and decree appealed from, I see no reason to think that the decree is contrary to law or otherwise erroneous or unjust. I therefore reject this application." The pauper applies here in revision against this order.

The applicant contends that the order of the learned District Judge was made without jurisdiction. He contends that once having issued notice, the learned District Judge had no jurisdiction to deal with the application summarily. We have been referred to

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various authorities for and against the contention of the applicant, and in particular to a case decided by a learned single Judge of this Court, namely *Hubraji* v. *Balkaran Singh* (1). We do not need to consider these cases. We decide the matter from another standpoint. The proviso to rule 1 of order XLIV reads as follows: "Provided that the court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust." It is to be noted that this proviso enacts that the court *shall* reject the application, *unless* upon a perusal thereof and of the judgment, the court sees reason to think that the decree is contrary to law . . . or is otherwise erroneous or unjust. The word "shall" is mandatory. The court has no option but to reject the application, unless, having read the application and the judgment, it has definitely come to the conclusion that there is a *prima facie* case to be heard. The court having once come to that conclusion and passed the necessary order issuing notice, it is, in our opinion, *functus officio* as regards a summary dismissal. The Judge cannot thereafter disregard his previous conclusion and order and dismiss the application summarily. He is bound before he does anything further to hear the parties.

In this particular case there is another reason for allowing the application. After notice has been issued, objections had actually been lodged by the opposite party. It would be impossible to say whether the Judge's second opinion upon the matter was not influenced by these objections, without hearing the applicant upon them.

In this view of the matter it is clear that the order complained of was passed without jurisdiction. The application in revision must be accepted and the order set aside with costs. The pauper's application to be allowed to appeal as a pauper will now be heard on the merits.

(1) (1931) I.L.R., 54 All., 394.