

1934

GAILU
alias
DALAI
v.
LEKHA
SINGH

Commissioner of Oudh in *Sant Bakhsh v. Nadir Mirza* (1). With great respect we are of opinion that the reasoning in *Sant Bakhsh v. Nadir Mirza* (1) is unsound and the correct law on the subject has been propounded in the decision of *Shib Kunwar Singh v. Sheo Prasad Singh* (2) quoted above.

*Nanavutty
and Ziaul
Hasan, JJ.*

For the reasons given above, we are unable to accept the contention urged by the learned Counsel for the defendants-respondents that whether the property is sold subject to a mortgage or charge or whether merely a notice of such incumbrance is given in the sale proclamation, the result is the same. This in our opinion is an entirely wrong construction of the provisions of Order XXI, rule 62 of the Code of Civil Procedure.

For the reasons given above, we allow this appeal, set aside the judgment of the lower appellate court and restore the judgment and decree of the trial court, with costs in this Court and in the lower appellate court.

Appeal allowed.

APPELLATE CIVIL*

*Before Mr. Justice C. M. King, Chief Judge and Mr. Justice
Ziaul Hasan*

1934
November, 2

BRIJ GOPAL AND ANOTHER, (JUDGMENT-DEBTORS-APPELLANTS)
v. MUSAMMAT MASUDA BEGAM (DECREE-HOLDER-
RESPONDENT).

*Transfer of Property Act (IV of 1882), section 83—Civil Pro-
cedure Code (Act V of 1908), Order XXIV—Maintenance
charged upon property—Suit for arrears of maintenance—
Preliminary decree passed—Deposit of decretal amount in
Court—Interest on decree, whether ceases from date of deposit
—Section 83, Transfer of Property Act, whether applies to*

*Execution of Decree Appeal No. 50 of 1933, against the order of Babu Mahabir Prasad, Subordinate Judge of Lucknow, dated the 14th of July, 1933, reversing the order of S. Akhtar Ahsan, Munsif, Haveli, Lucknow, dated the 10th of November, 1932.

(1) (1924) 27 O.C., 308.

(2) (1906) I.L.R., 28 All., 413.

the deposit—"Debt" in Order XXIV, rule 1, whether includes secured debt—Deposit after passing of preliminary decree, whether deposit during pendency of suit under section 24.

1934

BRIJ GOPAL
v.
MUSAMMAT
MASUDA
BEGAM

Where in a suit for arrears of maintenance charged upon certain property, a preliminary decree is passed and the defendant deposits the full amount of the decree in Court, interest on the decree ceases from the date of the decree.

Section 83 of the Transfer of Property Act is intended to apply to a deposit made by a mortgagor before the institution of a suit upon the basis of the mortgage. It does not apply to a deposit made after a suit upon the mortgage has already been instituted. Where there is no mortgage but the maintenance is charged upon certain property section 83 would apply in that case too.

The word "debt" in Order XXIV, rule 1 of the Code of Civil Procedure applies to a secured debt as well to an unsecured debt. The language of rule 1 is sufficiently wide to cover suits to recover debts which are secured by a mortgage or a charge.

A deposit of the decretal amount after the passing of the preliminary decree in a suit for arrears of maintenance charged upon certain property is a deposit during the pendency of the suit within the meaning of Order XXIV of the Code of Civil Procedure. *Digambar Das v. Harendra Narayan* (1), and *Amtul Habib v. Mohammad Yusuf* (2), relied on. *K. M. Bose v. Messrs. Allen Brothers* (3), distinguished. *Bayya Sao v. Narasinga Mahapatro* (4), and *Thevaraya Reddy v. Venkatachalam Pandithan* (5), referred to.

Mr. *Makund Behari Lal*, for the appellants.

Mr. *D. K. Seth*, for the respondent.

KING, C.J., and ZIAUL HASAN, J.:—The question for determination in this appeal is whether, in case the judgment-debtor deposits a sum of money in Court in satisfaction of a decree, interest on the decree should cease from the date of payment in proportion to the amount paid where the said amount is not sufficient to satisfy the whole decree.

(1) (1910) 14 C.W.N., 617.

(2) (1917) I.L.R., 40 All., 125.

(3) (1926) 97 I.C., 479.

(4) (1911) I.L.R., 35 Mad., 209.

(5) (1916) I.L.R., 40 Mad., 804.

1934

BRIJ GOPAL
v.
MUSAMMAT
MASUDA
BEGAM

The plaintiff brought a suit to recover a sum of Rs.825 on account of maintenance which was a charge upon certain property. She also claimed Rs.222-12 as interest up to the date of suit.

*King, C.J.
and Ziaul
Hasan, J.*

On the 27th of January, 1930, the trial court decreed the claim for Rs.825 only allowing no interest up to the date of the suit but allowing future interest from the date of the suit until realization at 6 per cent. per annum. It was also ordered that if the amount decreed were not paid within three months then the property charged with the maintenance should be sold. Soon after the passing of this preliminary decree, that is, on the 7th of February, 1930, the judgment-debtor deposited in Court a sum of Rs.848-3, that is Rs.825 on account of principal and Rs.23-3 for interest from the date of the suit until the date of the deposit. The plaintiff refused to accept the sum deposited and preferred an appeal against the trial court's decree claiming a further sum on account of interest up to the date of the institution of the suit. The appeal was dismissed by the Court of the Additional District Judge but on second appeal to the Chief Court the plaintiff was partially successful. The Chief Court found that a sum of Rs.111-6 was due to the plaintiff for interest up till the date of the suit, in addition to the sum of Rs.825 as principal. It was ordered that the principal sum of Rs.825 will carry interest at the rate of 6 per cent. per annum from the date of the suit until realization. The decree was made final on the 16th of July, 1932. Before the final decree was passed the decree-holder between the 7th and the 21st of May, 1931, attached and realized the sum deposited by the judgment-debtor. The decree-holder then applied for execution giving credit to the extent of the amount already received. The whole question between the parties in execution was whether the judgment-debtor was liable to pay interest on the sum of Rs.825 after the date of

his deposit. The decree-holder claimed interest on that sum up to the date of its actual realization in May, 1931. The trial court found that no interest should be allowed on the principal after the date of deposit but the lower appellate court has taken a contrary view and the judgment-debtor comes to this Court in second appeal.

The appeal came up for hearing before a learned single Judge of this Court who considered that the question was of sufficient importance to be decided by a Bench of two Judges and the appeal has accordingly been heard by this Bench.

The first question is whether the provisions of section 83 of the Transfer of Property Act will apply to the deposit which was made after the passing of the preliminary decree. In our opinion section 83 does not apply to the deposit. Section 83 is evidently intended to apply to a deposit made by a mortgagor before the institution of a suit upon the basis of the mortgage. We think it does not apply to a deposit made after a suit upon the mortgage has already been instituted. In the present case there was no mortgage but the maintenance was charged upon certain property and section 83 would apply to this suit if it were applicable to a suit upon a mortgage.

The learned Advocate for the appellant urges that the incidents of the deposit are governed by the provisions of Order XXIV of the Code of Civil Procedure. Order XXIV applies to payments made into Court by a defendant in any suit to recover a debt or damages. It has been argued that Order XXIV does not apply to mortgage suits but we see no reason why such a distinction should be made. Rule 1 lays down that "the defendant in any suit to recover a debt . . . may at any stage of the suit deposit in Court such sum of money as he considers a satisfaction in full of the claim." There seems to be no reason why the word "debt" should not apply to a secured debt as well to an unsecured debt. The language of the rule seems to be

1934

BRIJ GOPAL
v.
MUSAMMAT
MASUDA
BEGAM

King, C.J.
and Ziaul
Hasan, J.

1934

BRIJ GOPAL
v.
MUSAMMAT
MASUDA
BEGAM

King, C.J.
and Ziaul
Hasan, J.

sufficiently wide to cover suits to recover debts which are secured by a mortgage or a charge. This view is moreover supported by certain rulings. In *Bayya Sao v. Narasinga Mahapatro* (1), the facts were rather different but the suit was upon a mortgage and at page 214 the learned Judges observed: "We are of opinion that when a suit has once been instituted, payment into Court is regulated by Order XXIV, rule 1 of the new Code of Civil Procedure corresponding to section 376 of the old Code."

In the Full Bench case of *Thevaraya Reddy v. Venkatachalam Pandithan* (2) the mortgagor had made the deposit in Court under section 83 of the Transfer of Property Act but he withdrew this deposit and made another deposit after the suit upon the mortgage had been instituted. At page 806 one learned Judge remarked that in calculating interest from the date when the sum had again been deposited in Court by the mortgagor the amount deposited should have been deducted from the principal, and interest should have been allowed only on the balance. At page 808 also another learned Judge observed that he agreed that under Order XXIV, rule 3 of the Code of Civil Procedure, interest was not allowable upon the sum paid into Court after the institution of the suit. It was therefore, clearly the view of the Court that Order XXIV does apply to deposits made into Court after the institution of the suit, even in suits upon mortgages, and we think that this view is correct.

For the respondent it is argued that Order XXIV does not apply to a deposit made after the passing of a decree but only to a deposit made by the defendant during the pendency of the suit. This argument is borne out by the language of the Order, but it must be observed that this suit was in the nature of a suit upon a mortgage and the decree passed was only a

(1) (1911) I.L.R., 35 Mad., 209.

(2) (1916) I.L.R., 40 Mad., 801.

preliminary decree so the suit must be considered to remain pending until a final decree has been passed. It should be held therefore that the payment was made during the pendency of the suit, although it was made after the preliminary decree had been passed.

The case of *Digambar Das v. Harendra Narayan* (1) is directly in the appellant's favour. The facts of the case are very similar to the facts of the case before us. In that case also the mortgagor had made a deposit in Court after the passing of the preliminary decree. The question arose what effect such a deposit would have on the amount of interest payable to the decree-holder. The learned Judges took the view that even though the amount deposited was not sufficient to cover the whole sum due upon the mortgage, as found by the appellate Court, nevertheless the deposit could not be ignored and interest should cease to run to the extent of the sum deposited. The learned Judges relied mainly upon the English law and did not base their decision upon an interpretation of the Code of Civil Procedure but their conclusions are directly in favour of the appellant's contention.

In any case we think that the principles laid down in the rules of this Order may well be extended to the payment in question, even if the rules were not expressly intended to apply to payments made after the passing of a decree. The Allahabad High Court in *Amtul Habib v. Mohammad Yusuf* (2) has extended the principles of Order XXIV to execution proceedings and has held that where money is paid into Court by the judgment-debtor in satisfaction of the decree, interest on the decree will cease from the date of payment in proportion to the amount paid, although such amount may not in fact be the whole amount due under the decree. The respondent has relied upon the case of *K. M. Bose v. Messrs. Allen Brothers* (3)

1934

BRIJ GOPAL
v.
MUSAMMAT
MASUDA
BEGAM

King, C.J.
and Ziaul
Hasan, J.

(1) (1910) 14 C.W.N., 617.

(2) (1917) I.L.R., 40 All., 125

(3) (1926) 97 I.C., 479.

1954

BRIJ GOPAL
v.
MUSAMMAT
MASUDA
BEGAM

King, C.J.
and Ziaul
Hasan, J.

which, as he contends, conflicts with the view taken by the Allahabad High Court. We think that the ruling relied upon by the respondent can be distinguished as in that case the deposit which had been made was a *conditional* deposit. The judgment-debtor deposited a sum of money after the passing of the decree but made the deposit only on the condition that the money was not to be withdrawn by the decree-holder unless and until the latter deposited security. In the present case the deposit was made unconditionally.

It has been further argued for the respondent that even if Order XXIV is applicable to the facts of this case, and even if under Rule 3 of that Order no interest would be allowed to the decree-holder on the sum deposited by the defendant, the effect of these rules has been nullified by the passing of the final decree in accordance with the appellate decision of the Chief Court. It is true that the Chief Court modified the decree of the trial court by granting to the plaintiff a further sum of Rs.111-6 as interest up to the date of the suit. In other respects the decree of the trial court was upheld and in fact was not in any way challenged by either party. The result was that a sum of Rs.936-6 was declared to be due to the plaintiff up to the date of the suit and future interest was allowed upon the principal sum of Rs.825 at the rate of interest allowed by the trial court. It is clear that the fact of the deposit made by the judgment-debtor was not brought to the notice of the Chief Court and no question arose as to whether the amount of this deposit should be deducted from the sum decreed. The final decree was prepared in accordance with the Chief Court's' decision. The final decree did give credit for the amount deposited, as it had already been withdrawn before that date by the decree-holder, but the question of interest upon the principal sum after the date of the deposit was not considered. We think we are at liberty to consider in

these proceedings the effect of the deposit upon the interest due from the judgment-debtor.

In our opinion the principles of Order XXIV may be applied to the facts of this case even if the terms of that Order were not expressly meant to apply to deposits made after the passing of a decree. The judgment-debtor deposited the full amount found due by the trial court, both principal and interest. The plaintiff might have withdrawn this amount without admitting that it was in full discharge of her claim. She would not have prejudiced her appeal by the withdrawal of a certain sum in part satisfaction of her claim and we think it unreasonable that the judgment-debtor should be called upon to pay interest on the principal sum after the date of the deposit.

We accordingly allow the appeal and restore the order of the first Court dated the 10th of December, 1932, with costs throughout.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

ANGNO (DEFENDANT-APPELLANT) v. MOHAN LAL (PLAINTIFF-RESPONDENT)*

1934
March 21

Oudh Rent Act (XXII of 1886), sections 3(10), 19A and 141—Remission of rent—Section 19A, Oudh Rent Act, whether applies to thekedar—Thekedar agreeing to pay rent irrespective of any calamity—Thekedar, whether can get remission of rent—Civil Procedure Code (Act V of 1908), section 34—Section 141, Oudh Rent Act, whether controls section 34, Civil Procedure Code—No reason for allowing future interest at 12 per cent.—Interest at 6 per cent. is just and proper.

Section 19A of the Oudh Rent Act, which contains the provision for remission of rent, is not one of those sections in which according to section 3(10) of that Act, the expression "tenant" includes a *thekedar*. The rights and liabilities of a *thekedar*

*Second Rent Appeal No. 52 of 1932, against the decree of H. J. Collister, I.C.S., District Judge of Lucknow, dated the 24th of September, 1932, modifying the decree of S. Mohammad Zahid, Sub-Divisional Officer of Lucknow, dated the 9th of April, 1932.