

PRIVY COUNCIL.

KEDAR LAL MARWARI

v.

BISHEN PERSHAD.

P. C.*
1903
Nov. 10.
Dec. 2.

[On appeal from the High Court at Fort William in Bengal.]

Mortgage—Accounts—Accounts between two mortgagees one of whom redeems the other—Decree on previous mortgage—Interest, rate of—Privy Council, practice of—Objection to suit not taken in Courts below.

The appellant sued as mortgagee of a certain property under a mortgage dated 5th September, 1886. The respondent had, in a suit on an earlier mortgage of 1884, purchased in 1890 the rights of the mortgagor in the same property, and was also holder of a decree of 29th June 1891 in a suit on another mortgage of the same property dated 4th October 1882, which provided for compound interest in default of payment. To that suit the persons from whom the appellant derived title were parties. The decree of 29th June 1891 gave interest not in terms of the bond, but at a reduced rate. It being settled that the appellant should redeem:—

Held, (reversing the decision of the High Court) that in the accounts between them the respondent was only entitled in respect of the mortgage of 4th October 1882, to interest at the reduced rate allowed by the decree of 29th June 1891, and not to compound interest in terms of the mortgage bond.

An objection that the claim on the 5th September 1886 might and should have been enforced in the suit in which the decree of 29th June 1891 was given, and could not be made the subject of a fresh suit, was not allowed to be taken on appeal to the Judicial Committee, not having been raised in either of the Courts below.

The record of the case having been received in December 1900, but the case not set down for hearing until September 1903, the Judicial Committee directed the Registrar to disallow to the appellant any costs occasioned by his delay in prosecuting the appeal.

APPEAL from a judgment and decree (23rd May 1898) of the High Court at Calcutta, which reversed a judgment and decree (29th November 1895 and 20th April 1896) of the Subordinate Judge of Bhagalpore.

The representative of the plaintiff appealed to His Majesty in Council.

* *Present*: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser.

The suit out of which the appeal arose was brought to recover Rs. 10,720 alleged to be due on a mortgage dated 5th September 1886, of which the plaintiff was assignee by sale to him of 13th December 1894. The defendants were the mortgagor, Birj Pershad Singh, and his sons, who formed a joint family governed by Mitakshara law, and the subsequent purchasers of some of the mortgaged properties. The mortgagor defendants did not defend the suit. It was defended only by two of the purchasers of the interests of other mortgagees. One of such purchasers was the present respondent, Dewan Bishen Pershad; the other was one Ram Chandra Chowdhry, who was the purchaser of Baisasipore, one of the mortgaged properties. He, however, was not a party to this appeal. The defendant, Bishen Pershad, set up, amongst other pleas, a claim to Rs. 2,505 which he had paid on 6th December 1890 for Burhanpore, another of the mortgaged properties, which on that date was sold in execution of a decree of 7th January 1889 obtained on two mortgages executed by the mortgagor, Birj Pershad Singh, on 27th January 1884; and he also claimed two other sums, viz., Rs. 10,642-1-6 and Rs. 8,000, paid by him in satisfaction of a mortgage dated 4th October 1882, executed by the same mortgagor on the same property (Burhanpore), and on which a suit (No. 47 of 1890) was brought and decreed on 29th June, 1891.

The questions for determination in this appeal therefore were only between Biseswar Lal Marwari and Bishen Pershad, as to their respective rights under their mortgages, and as to the terms on which redemption should take place, or the mortgaged property be made liable. For these questions the further facts are sufficiently stated in their Lordships' judgment.

During the course of the trial before the Subordinate Judge the defendant, Bishen Pershad, was offered his election whether he would redeem the plaintiff's mortgage or allow the plaintiff to redeem him. He, however, declined to make such election.

The plaintiff prayed for mortgage accounts with compound interest and for sale of an eight-anna share of Burhanpore.

The defendant, Bishen Pershad, denied that the plaintiff had any right to redeem the property, of which he claimed by virtue of his purchases and payments, to be absolute owner. He pleaded

1903

KEDAR LAL
MARWARI
v.
BISHEN
PERSHAD.

1903

KEDAR LAL
MARWARI
v.
BISHEN
PERSHAD.

that at any rate the plaintiff could only redeem by payment of the entire amount of the mortgages of 4th October 1882, and of 27th January 1884, with interest according to the terms of the mortgage bonds.

The Subordinate Judge held that the plaintiff before he could bring the mortgaged property (Burhanpore) to sale, must pay to the defendant, Bishen Pershad, the sum of Rs. 2,505 with interest at 12 per cent. per annum from 21st December 1891, and Rs. 10,642-1-6 with interest at the same rate from 20th November 1891, and Rs. 8,000 with interest at the same rate, less any amount collected by Bishen Pershad from Burhanpore, which was in his possession under his purchase of 6th December 1890.

From this decree Bishen Pershad appealed to the High Court, and a Division Bench of that Court, (O'KINEALY and GUPTA JJ.) varied in Bishen Pershad's favour the decree of the Subordinate Judge. The judgment of the High Court was as follows:—

“The suit was on a mortgage. Originally the mortgage covered three properties; but one of them having been sold and the security being destroyed, the mortgage suit was carried on in respect to the other two properties. In regard to one of these two properties, the defendant Bishen Pershad was the owner, and the relation between him and the mortgagee, the plaintiff, who was enforcing the security, was of such a nature that he might either elect to redeem the mortgagee, the plaintiff, or he might ask the plaintiff to redeem him. The plaintiff has elected to redeem him, and so an account must be taken in the relation of mortgagee and mortgagor, as the defendant Bishen Pershad disclaims any intention to redeem the plaintiff.

“It appears also, that the defendant Bishen Pershad was a party to a suit brought on a prior mortgage, and he paid the amount due under the decree in that suit. Therefore, according to the law laid down in our Courts, he can hold out that mortgage as security to protect his interests. He is, accordingly, entitled to recover the amount of principal and interest according to the terms of that document, up to date. He will also receive the sum under Ex. R, namely, Rs. 2,505, to which no objection is taken in this Court. This, then, is all that can be given in his favour. On the other hand, he has to account for rents and profits in the ordinary way, up to date. Some few sums in regard to kamat land have been objected to, notably a sum of Rs. 600 and odd. A decree had been obtained for Rs. 1,100, mesne profits, and only Rs. 500 were realized. The Subordinate Judge has allowed that sum of Rs. 600 against him, on the ground that evidently he had given up that amount, which he could easily have obtained. The other sum in regard to kamat land is not contested, nor are the sums given in the jamabandi, and which appear in the account taken by the commissioner. Therefore the account to be taken will be in regard to the sum to which the appellant is entitled under the prior encumbrance, and the account will be made up to date. If the money is

not paid within six months from the date of the decree of this Court, the power to redeem will be lost.

"There are some items of expenditure for the years 1299 to 1300, which were evidently intended by the Subordinate Judge to be allowed in the account; but by some mistake they have not been entered in the account. We direct that these sums be added to the amount.

"We make no order as to costs in this Court."

The decree of the High Court by allowing interest on the mortgage of 4th October 1882 "according to the terms of that document" made a sum of Rs. 1,21,546-13-1 payable by the plaintiff to the defendant, Bishen Pershad, before the former could redeem the eight-anna share of Burhanpore.

On this appeal

Rattigan K.C. and *C. W. Arathoon*, for the appellant, contended that the High Court had wrongly held that the respondent Bishen Pershad was entitled to recover interest on the amount due on the bond of 4th October 1882 according to the terms of the bond. All he was entitled to, it was submitted, on that bond was interest at the reduced rate allowed on that bond by the decree of 29th June 1891 in suit No. 47 of 1890: and this had been rightly allowed him by the decree of the Subordinate Judge which should be upheld. Reference was made to Fisher on Mortgage, 4th Edition, p. 1009; Transfer of Property Act (IV of 1882) ss. 74, 75, 88, 89; *Aukindro Bhoosun Chatterjee v. Chunnoololl Johurry*(1), *Ganga Pershad Sahu v. Land Mortgage Bank*(2), *Ex-parte Fewings, In re Sneyd*(3), *In re European Central Railway Company*(4), and *Popple v. Sylvester*(5) a case referred to by Fry J. in the case of *Ex-parte Fewings*(3).

A. Phillips and *W. C. Bonnerjee*, for the respondent Bishen Pershad, contended that by his purchase and subsequent payments he became absolutely entitled to all the rights possessed by the other parties in suit No. 47 of 1890, to which all the persons then entitled to redeem Burhanpore were parties, and that, therefore, the alleged subsequent assignments of the mortgage of 5th September 1886 conveyed no right to redeem to the appellant. As

(1) (1879) I. L. R. 5 Calc. 101.

(2) (1893) I. L. R. 21 Calc. 366;

L. R. 21 I. A. 1.

(3) (1883) L. R. 25 Ch. D. 338.

(4) (1876) L. R. 4 Ch. D. 33.

(5) (1882) L. R. 22 Ch. D. 98.

1903

KEDAR LAL
MARWARI
v.
BISHEN
PERSHAD.

1903
 KEDAR LAL
 MARWARI
 v.
 BISHEN
 PERSHAD.

to the amount to be paid by the appellant, if he were allowed to redeem, it was submitted that the respondent was entitled to the benefit of the mortgage of 4th October 1882 and to the full amount due as principal on that mortgage with compound interest in terms of the bond. The cases of *Nilakant Banerji v. Suresh Chandra Mullick* (1), *Kasumunnissa Bibee v. Nilratna Bose* (2) were referred to. It was also contended that the claim in the present suit ought to have been enforced in suit No. 47 of 1890 to which the plaintiff (now represented by the appellant) was a party, and, that it could not now be made the subject of a fresh suit.

Counsel for the appellant were not called on to reply.

The judgment of their Lordships was delivered by
 LORD MACNAGHTEN. This suit was brought by the late
 Dec. 2. appellant, Biseswar Lal Marwari, to enforce a mortgage bond dated the 5th of September 1886 hypothecating, together with other property, 8 annas of a mouzah known as Burhanpore or Badhanpere.

It seems that this share of Burhanpore was included in an earlier mortgage bond dated the 27th of January 1884. The owner of that encumbrance brought a suit to enforce his security and obtained a decree. The property was put up for sale on the 6th of December 1890. It was then bought for Rs. 2,505 by the late respondent, Dewan Bishen Pershad, in the name of his relative Sambhu Sahai. The encumbrancer from whom the appellants derive title was not a party to this suit or bound by the decree for sale.

Another suit (No. 47 of 1890) brought in respect of the same property on a bond dated the 4th of October 1882 resulted in a decree dated the 29th of June, 1891. The principal question in that suit was as to the rate of interest on the money secured by the bond. The bond purported to reserve interest at the rate of 2 per cent. per month, with annual rests and compound interest. But the learned Judge held that rate exorbitant and improper under the circumstances, and allowed only simple interest at the

(1) (1885) I. L. R. 12 Calc. 414 ; L. R. 12 I. A. 171.

(2) (1881) I. L. R. 8 Calc. 79, 88.

rate of 1 per cent. per month, or 12 per cent. per annum. Sambhu Sahai, who represented the Dewan, was added as a party, and the decree was pronounced in his presence and also in the presence of the person from whom the appellants derive title, who being already a party to the suit was ordered to be "made a defendant as a subsequent mortgagee." Under this order, which was dated the 8th of September 1890, amendments seem to have been made though they are not to be found in the record. The order for sale of the property appears to have been made absolute. But on the day of the auction the Dewan deposited the amount found due to the plaintiff, the decree-holder. It was accepted by him. The sale did not take place and the order for sale dropped. There was at the time an appeal pending on behalf of the plaintiff, who was dissatisfied with the rate of interest allowed, and also a cross-appeal on behalf of the Dewan on some question of costs. Ultimately a compromise was made. The Dewan paid the plaintiff Rs. 8,000 in addition to the amount found due to him. By an order of the High Court dated the 21st of June 1892 the plaintiff's appeal was by consent dismissed without costs, and so the order reducing the rate of interest on the bond of the 4th of October 1882 as against the mortgaged property and the subsequent mortgagees became absolute.

In the present suit Bisseswar Lal obtained a decree to enforce his mortgage security of the 5th of September 1886. The Dewan who, as purchaser at the sale of the 6th of December 1890, had succeeded to the rights of the mortgagor and who also stood in the shoes of the decree-holder under the decree of the 29th of June 1891, declined to redeem, and accounts were directed to be taken in view of Bisseswar Lal either redeeming the Dewan or in default of payment standing foreclosed.

The accounts as passed by the Subordinate Judge, allowed the Dewan the sum found due to the plaintiff in the suit No. 47 of 1890, with interest on the sum secured by the bond of the 4th of October 1882 at the reduced rate allowed by the decree of the 29th of June 1891, and also the sum of Rs. 8,000 paid by the Dewan to the plaintiff in that suit on the occasion of the compromise, which resulted in the order of the High Court dismissing the plaintiff's appeal.

1903
 KEDAR LAL
 MARWARI
 v.
 BISHEN
 PERSHAD.

1903
 KEDAR LAL
 MARWARI
 v.
 BISHEN
 PERSHAD.

From the final decree in this suit of the 20th of April 1896 the Dewan appealed to the High Court. The judgment of the High Court was pronounced on the 23rd of May 1898. The Court held that the Dewan was entitled to recover the sum of Rs. 2,505 paid for the property at the sale of the 6th of December 1890, which was allowed by the Subordinate Judge and to which no objection was taken in the High Court, and also the amount of principal and interest secured by the bond of the 4th of October 1882, "according to the terms of that document up to date," while on the other hand he had "to account for rents and profits in the ordinary way up to date." A slip in the accounts of rents and profits as passed by the Subordinate Judge was corrected. No order was made as to costs in the High Court.

The effect of that order, as worked out with interest at 2 per cent. per month and annual rests, resulted in Bisseswar Lal having to pay Rs. 1,21,546-13-1 in order to recover 8 annas of Burhanpore.

The appellants contend that the Dewan was not entitled to a higher rate of interest under the bond of the 4th of October 1882 than that allowed by the decree of the 29th of June, 1891. Their Lordships think this contention is plainly right. The High Court gives no reason for disregarding the decree of the 29th of June 1891, and none was given at the Bar. The predecessor in title of the appellants was a party to that decree as well as the Dewan, and the Dewan himself before the Subordinate Judge claimed to be allowed, and was allowed, as against Biseswar Lal and the mortgaged property, the sum of Rs. 8,000, which he voluntarily paid as the consideration for having the decree reducing the rate of interest made absolute.

It was contended on behalf of the Dewan's representatives (who alone defended this appeal) that Bisseswar Lal ought to have enforced his right, if any, in the suit No. 47 of 1890, and that it was not competent for him to bring a fresh suit. Assuming that contention to be well founded, it seems to their Lordships much too late now to raise a point not insisted upon in either of the Courts below. It was also urged that the effect of the Dewan finding the money to pay off the plaintiff in the suit No. 47 of 1890 was to foreclose all subsequent mortgages and make the

Dewan absolute owner of the property. It is hardly necessary to say that their Lordships were unable to accept that view of the transaction.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be discharged, and that the Dewan's representatives ought to pay the costs in that Court, and that the order of the Subordinate Judge ought to be restored, subject to correction of the slip in that order pointed out by the High Court, the accounts brought up to date, and six months from the date of His Majesty's Order in Council fixed for redemption of the property.

The Dewan's representatives will pay the costs of the appeal.

Their Lordships observe that the Record in this case was received in December 1900, but that the case was not set down for hearing till September 1903. They have accordingly directed the Registrar to disallow to the appellants any costs which, in his view, may have been occasioned by delay on the part of the appellants in prosecuting the appeal.

Appeal allowed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitor for the respondents : *G. C. Farr.*

J. V. W.

1903
KEDAR LAL
MARWARI
v.
BISHEN
PERSHAD.