

Privy Council Appeals Nos. 126 and 127 of 1926.

Allahabad Appeals Nos. 10 and 11 of 1924.

Shib Chandra and another - - - - - *Appellants*
v.
Lachmi Narain and others - - - - - *Respondents*
Same - - - - - *Appellants*
v.
Pandit Rameshar Sahai and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1929.

Present at the Hearing :—

LORD BLANESBURGH.

LORD TOMLIN.

SIR BINOD MITTER.

[*Delivered by* SIR BINOD MITTER.]

These are two consolidated Appeals against two decrees dated the 11th December, 1923, of the High Court of Judicature at Allahabad, setting aside two decrees dated the 18th January, 1921, of the Court of the Subordinate Judge Moradabad.

The two suits in which the decrees of the High Court were passed were brought by the plaintiffs respondents separately against the appellants to redeem two items of properties covered by a mortgage dated the 23rd March, 1905, namely, 13 Biswas of the village Sadat Bari and the whole village Rudain, respectively, and the question for determination now is whether the deposit made by the plaintiffs under section 83 of the Transfer of Property Act on the 29th June, 1912, was sufficient.

On the 23rd March, 1905, the original mortgagors executed a mortgage deed in favour of the appellant Shib Chandra and another who, on the same day executed a lease in favour of the mortgagors in respect of the mortgaged premises and under that

lease the mortgagors agreed to pay Rs. 2,325 in two instalments per annum (which also was the agreed amount of interest under the mortgage deed), together with the sum of Rs. 1,526 as Government revenue on the properties. It was agreed that if there was any deficiency in the payment of interest or lease money then the amount should carry compound interest at the rate of 1 Re. per cent. per mensem. It was provided by the mortgage deed that each property could be separately redeemed in the month of June of any year on payment of the amount entered against it in the deed provided always that the interest on the whole mortgage money had been paid or tendered at the time of such redemption. The consideration stated in the mortgage deed was Rs. 35,000. The only sum the mortgagors ever repaid was Rs. 1,000 in January, 1907.

On the 14th January, 1910, the mortgagees brought a suit in the Court of the Subordinate Judge of Moradabad (hereinafter referred to as the original suit) against the mortgagors for recovery of Rs. 12,327-5, being the interest or lease money up to June, 1909, together with compound interest at 12 per cent. per annum as provided for in the mortgage deed and in the lease. The mortgagees further claimed interest *pendente lite* and interest up to realization, and they also prayed for sale of the mortgaged properties in default of the payment of the amount that might be decreed in their favour and claimed possession of the mortgaged premises. The mortgagors contended that the whole of the Rs. 35,000 mentioned in the mortgage deed had not been advanced, but that a sum of Rs. 30,984 was only advanced and that the interest payable on the mortgage or the lease money should be proportionately reduced.

On the 23rd February, 1912, the Subordinate Judge decided that the sum actually advanced was Rs. 30,984, and that, therefore, the amount of annual interest or lease money was Rs. 2,058-3-6 and not Rs. 2,325, as stated in the mortgage deed and the lease. He accordingly passed a decree for Rs. 10,720-10-4 and interest thereon at the rate of 6 per cent. per annum until realization with costs amounting to Rs. 1,770-2-8. He also gave the mortgagees a decree for sale under Order XXXIV, Rule 4 of the Code of Civil Procedure, 1908, in default of the payment of the decretal amount on or before the 22nd August, 1912, and he further decreed that Rs. 12,812-7-3 would be due on that date. He further decreed possession of the mortgaged properties to the mortgagees, and they, on the 3rd April, 1912, obtained symbolical but not actual possession.

It appears that the Subordinate Judge did not allow any interest during the pendency of the original suit and the mortgagees (that is the present appellants) appealed against the decree of the Subordinate Judge to the High Court of Judicature at Allahabad and the High Court, on the 27th January, 1914, varied the decree of the Subordinate Judge by allowing interest during the pendency of the suit to the extent of Rs. 2,706-2,

and they allowed the costs of the appeal, which were fixed at Rs. 416-12-6. The decree of the Subordinate Judge was therefore increased by Rs. 3,122-14-6.

While the appeal of the mortgagees was pending the mortgagors on the 12th April, 1912, sold and conveyed their equity of redemption in Mauza Sadat Bari to Pandit Bihari Lal (the predecessor-in-interest of the present plaintiffs in the first suit—that is suit No. 333 of 1919), and they also on the 22nd June, 1912, sold and conveyed their equity of redemption in Mauza Rudain to Rameshwar Sahai and Bhola Nath (the latter being the predecessors-in-interest of respondents two and three in suit No. 371 of 1919).

In the mortgage deed in suit the sum of Rs. 13,000 was entered as the principal amount against Village Rudain, and the sum of Rs. 5,000 was entered as the principal against Sadat Bari. Bihari Lal, the purchaser of Sadat Bari, also purchased certain other items of property; *i.e.*, a grove consisting of some land in Majahidpur Sarai and certain houses and shops, and the sum of Rs. 4,000 was entered against them as the principal. This last-mentioned property is not the subject matter of the suits for redemption.

The conveyance of the 12th April, 1912, mentioned that the sum of Rs. 32,000 was left with the purchaser for payment of the miscellaneous debts due under decrees and mortgage money and other debts, etc., payable by the vendors, and it was agreed that the vendors should cause to be paid by the purchaser under their supervision the sum of Rs. 32,000 to the creditors of the vendors. By the deed of the 27th June, 1912, the sum of Rs. 13,000 was left with the purchasers of Village Rudain for payment to the mortgagee.

On the 29th June, 1912, a sum of Rs. 41,837-5-6 was deposited in Court by the purchasers under Section 83 of the Transfer of Property Act, and the respondents allege that on this deposit being made they were entitled to call upon the mortgagees to reconvey the properties which they had purchased.

The question is whether this sum was sufficient. The sum of Rs. 41,837-5-6 was made up of the following items:—

- (a) Rs. 16,120-14-6 for principal allocated for redemption of all the properties purchased by Bihari and interest on the entire mortgage from January, 1910, to June, 1912.
- (b) Rs. 4,716-7-0 paid by Bihari towards satisfaction of the decree in part of the original suit.
- (c) Rs. 13,000-0-0 paid by Rameshwar Sahai.
- (d) Rs. 8,000-0-0 paid by Rameshwar Sahai towards the decree in the original suit.

Rs. 41,837-5-6

The Subordinate Judge in his judgment has held that the sum that the purchasers ought to have deposited was Rs. 45,935-13-3. He held that although the judgment of the High Court was not delivered till January, 1914, still on the date of the tender that sum which the High Court allowed in addition to what the Subordinate Judge in the original suit had awarded was in fact due on the 29th June, 1912. He also held that although the principal sum of Rs. 35,000 had been held not to have been paid, but that only Rs. 30,984 had been advanced on the mortgage, still there should be no proportionate reduction of the sums fixed for the redemption of each item of property as entered in the mortgage deed against that property. He further held that the costs of the appeal to the High Court as also the land revenue that had been paid to the Government by the mortgagees with interest thereon should be taken into account. In his view Rs. 45,935-13-3 was the sum that the purchasers had to pay before they could redeem the properties purchased by them. Accordingly he held that the tender fell short by Rs. 4,098-7-9. On appeal, however, the High Court held that the sufficiency of the amount of deposit should be judged by the state of things on the 29th June, 1912, irrespective of the result of the appeal and they further held that as only Rs. 30,984 was advanced instead of Rs. 35,000, the equitable method of dealing with this would be to distribute the reduction of principal over each item of property specified at the foot of the mortgage, and that by adopting this method the principal sum payable by the purchasers would be Rs. 19,472-12-11 instead of Rs. 22,000.

Their Lordships are of opinion that the view of the High Court on this last-mentioned point is correct, and in fact Mr. Dunne, for the appellants, did not seriously contest it. Their Lordships are, however, of opinion that the purchasers were bound by the decision of the High Court whereby that Court increased the amount awarded by the Subordinate Judge in the original suit by Rs. 3,179. The purchasers can have no higher rights than their vendors, and it appears to their Lordships also that the sale having been made during the active prosecution of the litigation between the mortgagees and the mortgagors, the purchasers must be bound by the result of the litigation (*see* Section 52, Transfer of Property Act, and I.L.R. 29 Allahabad 339 (P.C.)).

Their Lordships are further of opinion that Rs. 926-9-10 were due to the mortgagees, for Government revenue and interest thereon, both by the terms of the mortgage deed and the lease as also by the general law of mortgage in India.

The High Court in its judgment has held that the whole of this sum should not be added for the purpose of testing the sufficiency of the tender, but that it should be equitably distributed as against the purchasers in the same way as the principal amount of Rs. 22,000 is to be distributed. Even if this view were taken, the amount would work out at about Rs. 614, which would make no difference in the result.

Their Lordships, however, think that this view of the High Court is not correct. It is quite clear that the mortgagees by paying the Government revenue are entitled to add the same for the purpose of ascertaining their total dues under their mortgage. (*See Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*, 11 Moore's I.A. 241 at page 258). In the present case under the mortgage deed Government revenue has to be deducted in the first instance from the entire income, therefore, it should be deducted before any credit for interest is given at all, and when the tender of interest was made on the 29th June, 1912, the mortgagees were entitled to deduct the Government revenue paid by them and interest thereon from the interest which had been paid by the mortgagors and only credit the balance to the interest account, and as the purchasers had to pay the entire interest before they could call for redemption, this suggestion of the High Court seems to their Lordships to be wrong.

Mr. De Gruyther contended that as the purchasers deposited all instalments of interest from January, 1910, to June, 1912, and added thereto the interest on the same they had thereby in fact paid the full interest during the pendency of the original suit, namely, from June, 1909, to February, 1912.

The Subordinate Judge, in the original suit, had decreed interest up to June, 1909, and fixed the same at Rs. 10,720-10-4, therefore, on 1st June, 1910, the interest that must be calculated would be not only interest on the instalment from June, 1909, to June, 1910, but upon the decreed amount of Rs. 10,720-10-4, plus the instalment that fell due between June, 1909, and June, 1910, as the mortgage deed provided for compound interest. The argument of Mr. De Gruyther, therefore, seems more specious than sound. If calculation is made on this basis even then the deposit is insufficient.

Deducting, however, from the said sum of Rs. 45,935-13-3 (which the Subordinate Judge held due in June, 1912), the sum of Rs. 2,527-3-1, which represents the difference between the said principal sum of Rs. 22,000 and Rs. 19,472-12-11 which the High Court rightly held to be the principal sum payable by the purchasers, the deposit should have been for Rs. 43,405-10-2. The result, therefore, is that the deposit was insufficient and interest did not cease to run from the 29th June, 1912, and their Lordships accordingly hold that the decrees of the High Court should be set aside and the cases remitted for the ascertainment of the sum which is due to the mortgagees from the mortgagors and they are of opinion that a decree for redemption under Order 34, Rule 7, should be passed on the aforesaid basis.

The contesting respondents will pay to the appellants the costs of these appeals as also their costs in the Courts below. The mortgagees will also be at liberty to add their costs to their claim. The mortgagors, if they have incurred any costs, will bear the same.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

SHIB CHANDRA AND ANOTHER

v.

LACHMI NARAIN AND OTHERS

SAME

v.

PANDIT RAMESHAR SAHAI AND OTHERS

DELIVERED BY SIR BINOD MITTER.

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