

Gyasi Ram

Vs

Brij Bhushan Das and Ors.

Civil Appeal No. 959 of 1964

(K.N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

30.03.1966

JUDGMENT

WANCHOO, J.-

This is an appeal by special leave against the judgment of the Madhya Pradesh High Court and arises in the following circumstances. The appellant brought a suit for redemption of certain mortgaged property. A preliminary decree was passed in the suit on February 3, 1954. It specified the amount due as principal and the amount due as interest upto a certain date. It also provided that future interest was to be paid at three per cent per annum on a certain sum from that date till the date of realisation. Parties were to bear their own costs. Further the decree provided for payment of the amount due on or before July 15, 1964 or within such time as might be extended. It also provided that if payment was made within the time limited under O. XXXIV r. 7(1)(c) of the Code of Civil Procedure, final decree would be passed. In the alternative it was provided that if the deposit was not made, the respondent would be entitled to apply for passing of a final decree praying that the right of the appellant to redeem the mortgaged property be debarred.

There were appeals by both parties from this preliminary decree to the High Court. In the meantime the appellant had prayed for extension of time and the trial court had extended time for making payment upto August 15, 1954. About the same time, the appellant applied to the High Court praying that the order requiring him to deposit the decretal amount by August 15, 1954 be stayed till disposal of the appeal by the High Court. On this application, the High Court passed an order on July 26, 1954. This order provided that if the appellant gave an undertaking to pay nine per cent per annum interest instead of three per cent per annum during the period of stay, the order of the trial court directing the appellant to deposit the decretal amount by August 15, 1954 would be stayed. Thereupon the appellant gave an undertaking to the trial court on August 7, 1954 that he would pay nine per cent per annum simple interest instead of three per cent per annum during the period of stay. In consequence the order of stay passed by the High Court came into force and no deposit was made by August 15, 1954. On October 16, 1958, the High Court dismissed both the appeals and the preliminary decree stood confirmed.

On March 20, 1959, the appellant applied to the trial court for permission to deposit the sum of Rs. 42,204/5/-. On March 27, 1959, the trial court permitted the appellant to deposit the amount but made it clear that this did not amount to any extension of time for making the deposit, and the question whether the deposit was made within time would be decided after hearing both parties. Notice was also issued to the respondent on the same date. On March 28, 1959, the appellant deposited the amount. On April 8, 1959 the respondent appeared and objected that the amount due was not Rs. 42,204/5/- but Rs. 46,882/6/6 and therefore the deposit was short by a sum over Rs.

4,000/-. Thereupon the appellant deposited a further sum of Rs. 4,590/- on April 9, 1959 and prayed for a final decree in his favour. The trial court held on April 18, 1959 that the deposit was made beyond time and therefore directed that a final decree for foreclosure in favour of the respondent be drawn up. The appellant then went in appeal to the District Judge. The Additional District Judge who heard the appeal rejected the memorandum of appeal as insufficiently stamped. The appellant then filed a revision before the High Court. The High Court allowed the revision on July 22, 1961 and remanded the appeal to the Additional District Judge for decision on the merits. On March 23, 1962, the Additional District Judge allowed the appeal holding on the basis of O. XXXIV, r. 8 that as the amount had been paid before the final decree was passed, it was within time. Consequently the Additional District Judge ordered that a final decree be drawn up in favour of the appellant. It may be noticed that it was also contended before the Additional District Judge that the amount deposited was short by Rs. 88/1/-. The Additional District Judge pointed out that this was not made a ground of attack in the trial court. In any case he held that the amount which had to be deposited was as required by the preliminary decree and that the same had certainly been deposited. We may add that it is not in dispute between the parties that if the amount to be deposited is to be in accordance with the preliminary decree, the appellant has deposited that amount, rather more. The shortage was occurred because for the period of stay the High Court had ordered the payment of an extra six per cent per annum interest and it is with respect to that interest that the shortage has occurred.

The respondent then went in second appeal to the High Court. The High Court agreed with the Additional District Judge and held that in view of O. XXXIV r. 8(1) the deposit made on April 9, 1959 before the final decree was passed on April 18, 1959 was within time, even though the money might have been deposited after the time fixed under O. XXXIV r. 7. But the High Court also took the view that the mortgagor-appellant had to deposit the entire amount due on the date of the deposit and as there was a shortage of Rs. 88/1/-, the entire amount had not been deposited and in consequence no final decree could be passed in favour of the appellant. In the result the High Court set aside the order of the Additional District Judge and restored the order of the trial court passing a decree for foreclosure in favour of the respondent. Thereupon the appellant obtained special leave from this Court, and that is how the matter has come before us.

The only question raised on behalf of the appellant is that he had deposited the amount which was strictly due under the preliminary decree and something more. The shortage was only on account of the sum due as a result of the stay order passed by the High Court by which he was required to pay six per cent per annum more as interest for the duration of the stay. It is urged that this amount could not be taken into account in considering the question whether the appellant had deposited the entire amount due under the preliminary decree. We are of opinion that there is force in this contention and the appeal must succeed. Under O. XXXIV, r. 8(1) the mortgagor can deposit all amounts due under O. XXXIV r. 7(1) before the final decree debarring him from all rights to redeem is passed. Order XXXIV r. 7(1) lays down what a preliminary decree should contain and we are in the present case concerned with cls. (b) and (c) thereof. In this case the preliminary decree had declared the amount due upto a certain date towards principal and interest and had also provide for three per cent per annum interest on a certain sum from that date and had directed as required by cl. (c) of O. XXXIV r. 7(1) that if the mortgagor-plaintiff paid in court the amount found before a certain date a final decree in his favour would be passed. The preliminary decree also laid down that if payment was not made within the time fixed a final decree for foreclosure in favour of the defendant-mortgagee would be passed. Now under O. XXXIV r. 7(1)(c)(i) and (ii) what the appellant had to deposit was the amount found under the preliminary decree and also "the amount adjudged due in respect of subsequent costs, charges, expenses and interests". It is not in dispute, as

we have already indicated that the appellant paid the amount found due under the preliminary decree and also the subsequent interest as provided in the decree. Only there was a shortage in the extra amount he had undertaken to pay as extra interest at the rate of six per cent per annum for the period of stay. The question is whether this amount can be said to be within the words "the amount adjudged due in respect of subsequent costs, charges, expenses and interests". We are of opinion that this extra amount which was to be paid on account of the undertaking of the appellant for the purpose of stay cannot come within the words "in respect of subsequent costs, charges, expenses and interest". It is not in dispute that the High Court dismissed the appeal of the appellant in 1958 and confirmed the preliminary decree and that the amount due on account of the undertaking to pay extra interest at the rate of six per cent per annum for the period of stay was not included by the High Court in the preliminary decree. This amount arose out of an independent order or stay and though the appellant was bound to pay it in view of his undertaking, it was not made a part of the amount due under the preliminary decree. Nor can it be said that it was due in respect of subsequent costs, charges, expenses and interests. Besides, such subsequent costs, charges, expenses and interests have to be adjudged before the mortgagor is asked to deposit the amount and it is not in dispute that no adjudgement as to any subsequent costs, charges, expenses and interests was made. So in order that a final decree may be passed in favour of the appellant, he had to carry out the terms of the preliminary decree and it is not in dispute that he had carried out the terms of that decree, and he had to pay nothing on account of subsequent charges, costs, expenses and interests, for nothing was adjudged in respect of these. Nor as we have said already can the amount due as extra interest on the basis of the undertaking given by the appellant for the period of stay be considered to be of the nature of subsequent costs, charges, expenses and interests mentioned in O. XXXIV r. 7(1)(c)(i) and (ii).

It is however urged that on this view there would be no way to enforce the appellant's undertaking to pay extra interest for the period of stay. We do not think so. It would in our opinion be in order for the court to insist before it passed the final decree that the appellant honours his undertaking. But that is not to say that this amount due under an independent order of the High Court in connection with stay became part of the amount due under the preliminary decree or could be considered to be "subsequent costs, charges, expenses and interests". We may add that the shortage in question was made good by the appellant soon after the order of the Additional District Judge and long before the judgment of the High Court. As we have come to the conclusion that this amount due on account of the undertaking given by the appellant in the matter of stay cannot be taken to be part of the amount due under the preliminary decree, it must be held that the appellant was entitled to a final decree in his favour. We therefore allow the appeal, set aside the order of the High Court and restore the order of the Additional District Judge. The respondent will be entitled to withdraw the amount deposited by the appellant including the amount deposited on April 21, 1962 on the conditions in that order. In the circumstances however we pass no order as to costs throughout.

Appeal allowed.

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