Radha Nath Roy and Others Vs Satyendra Nath Roy Chowdhury and Others

Court: Calcutta High Court

Date of Decision: March 28, 1935

Judgement

Panckridge, J.
The matter is not altogether free from difficulty. The Plaintiffs mortgagees obtained the usual preliminary mortgage decree

on March 27th, 1922, and on August 7th, 1922, the Registrar reported that Rs. 2,89,597-9-3 was being due on February 28th, 1923. The

mortgage debt was two lakhs of rupees. The mortgage deed provided that the mortgagors should pay interest on that sum at the rate of 8 per cent.

with yearly rests. On April 16th, 1923, the final decree was made which was in the ordinary form and provided that the decretal amount should

bear interest at 6 per cent. until realisation.

2. On August 13th, 1923, a, date was fixed for the sale of the mortgage properties. Thereafter matters dragged on owing to the fact that the

mortgagors were anxious not to have the properties put up to sale and made various applications to the Court for postponement. The first of these

applications came on before C.C. Ghose, J., on December 14th, 1923, and by consent this sale was postponed on certain terms. These terms are

set out in the Schedule to the order and are as follows:--""(1) The Defendants shall pay interest on the decretal amount and in the manner provided

in the mortgage from the date of the decree absolute until repayment in full. (2) The Defendants waive publication of the sale proclamation in

respect of the mortgaged properties. All costs of publication, Sale Notification and of the application to be paid to the Plaintiffs by the Defendants

as between attorney and client.

3. On February 20th, 1924, Buckland, J., dealt with another application for postponement, which was disposed of in a manner closely resembling

the result of the former application, that is, the sale was postponed on terms which were not very different from those embodied in the former

order and Included the same stipulation as to the enhanced rate of interest.

4. At a later stage there were further applications for postponement which I dealt with and dismissed. The Defendants appealed against my orders,

and I am told their appeals were dismissed. In any case the position now is that all the mortgaged properties have been sold, and the Plaintiffs state

that the money which they have received on account of the sale proceeds and otherwise, leaves a balance outstanding of Rs. 1,08,000, and they

now apply under Or. 34, r. 6 of the CPC for a personal decree for that amount. I am informed by the Defendants, and I assume it to be correct,

that but for the enhancement of the rate of interest from 6 per cent. to 8 per cent. nothing would now be due to the Plaintiffs.

5. The Defendants resist the application chiefly on the ground that the unpaid balance which the Plaintiffs claim is not an ""amount due"" to the

Plaintiffs within the meaning of the rule. They say that a personal decree can only be asked for if the balance is a balance due under the decree as it

originally stood, that is, on the basis of interest at 6 per cent. on the decretal amount. I think that it is clear that there is nothing to prevent the

parties to a mortgage decree from agreeing that such decree shall be varied by the interest being enhanced as a consideration for certain

concessions on the part of the decree-holder. That principle is, I think, recognised in the case of Debendra K. Mallik v. Pradyumna K. Mallik I. L.

R. 62 Cal. 28 (1934). In that case the parties agreed in writing that the decree in a certain suit was to be altered and varied by the inclusion in it of

certain terms, including a term for a higher rate of interest. The difficulty here arises from the fact that the parties have not succeeded in expressing

their intentions with the same clarity and precision as parties in the reported case to which reference has just been made.

6. The Defendants contend that on the true construction of this particular term it is merely a promise oh the part of the Defendants'' to pay an

additional sum by way of interest, and, if it is enforceable, then it is so only by means of a suit. I have come to the conclusion that this view is not

the correct one. The term is certainly capable of execution, and so the Defendants can derive no assistance from that line of cases which deal with

terms of settlement that have reference to matters standing outside the subject-matter of the suit, and are, therefore, not capable of execution.

7. It will also be noticed that the terms provide that the costs of the publication of the Sale Notification and of the application shall be paid by the

Defendants to the Plaintiffs. It cannot be argued that it was the intention of the parties that the Plaintiffs'' right to recover these costs should be the

subject-matter of independent litigation, and there is nothing in the form of the terms of settlement to lead one to suppose that the parties intended

that the manner of their enforcement should differ. In these circumstances the Plaintiffs are entitled to the order prayed, but of course the amount

will be the amount found due after proper enquiry. I do not at this stage pronounce any opinion with regard to the quantum.