

Gafur Imam Vs. Amir Isab Saudagar

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Court : Mumbai

Decided On : Feb-05-1925

Reported in : AIR1925Bom484; (1925)27BOMLR629

Judge : Norman Macleod, Kt., C.J. and ;Coyajee, J.

Appeal No. : Second Appeal No. 817 of 1923

Appellant : Gafur Imam

Respondent : Amir Isab Saudagar

Disposition : Appeal allowed

Judgement :

Norman Macleod, Kt., C.J.

1. The plaintiffs sued to obtain possession by partition of their one-third share in the suit property, and for recovering contribution from the defendants for money paid by the plaintiffs for redeeming the other two-thirds in the same.

2. The trial Judge held that the plaintiffs could claim one-third share in the suit property; that they had redeemed the mortgages on the property and obtained possession; and that the plaintiffs were entitled to a sum of Rs. 65-10-8 from the defendants as their contribution towards the expenses incurred in redeeming the property. He did not allow the plaintiffs any interest on that amount.

3. The third defendant alleged that he had repaired the house at a cost of Rs. 350 after he had purchased the interest of the first defendant, are of the original mortgagors The Judge found that he had spent Rs. 850, and hold that the plaintiffs were liable to pay one-third of that amount,

4. In appeal the appellate Judge held that plaintiffs were entitled to interest on the amounts which they had spent in paying off the mortgagee, and considered twelve per cent, as a reasonable rate, but he differed from the Court below with regard to the money spent by the third defendant in making repairs, and found he could not be considered a bona fide purchaser, and consequently passed a decree for the plaintiffs that their one-third share should be equitably separated and given in their possession and the third defendant should pay to the plaintiff No. 1, Rs. 154 as his share of the mortgage money with interest at six per cent, thereon from the date of suit till payment within two months from the date of the decree.

5. The third defendant has appealed. He contends that he ought to have been allowed

proportionate costs of repairs made by him to the house situated in the suit land, and that the Judge erred in law in awarding interest to the plaintiff on the amounts spent by him in redeeming the property. We do not think that the third defendant in the circumstances of the case is entitled to charge the plaintiff with his proportion of the cost incurred by him in executing repairs to the property.

6. On the question whether he is liable to pay interest for the plaintiffs on his proportion of the expenses properly incurred in redeeming the property, there is no direct authority. Section 95 of the Transfer of Property Act says:-

Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

7. In a note in Mitra's work on the Transfer of Property Act (2nd Edu.) to Section 95 we find the following passage at page 511:-

The redeeming co-mortgagor has a right to claim interest on the money paid by him. The rate of interest must be reasonable. The fact that he had to borrow redemption money at a high rate of interest is not a ground for charging the same rate from the other co-mortgagors.' The authority for that proposition is *Jago v. Arjun* (1918) 49 I.C. 230 . 'In *Raushan Ali Khan Chowdhury v. Kali Mohan Moitra* (1906) 4 C.L.J. 79 the Court allowed interest at twelve per cent.' We have been referred, however to the case of *Malik Ahmad Wuli Khan v. Mussamat Shamai Jahan Begam* (1908) L.R. 33 IndAp 81 8 Bom. L.R. 397. The principal question argued was whether the redeeming co-mortgagor could claim contribution from his co-mortgagors if he had not obtained possession of the mortgaged property. The Privy Council held that the section should be construed distributively, and that the charge followed on redemption; the condition of obtaining possession applied only to cases in which its fulfilment was from the nature of the mortgage possible. The plaintiff claimed during the argument that he was entitled to recover two-thirds of the amount paid by him, with interest at the stipulated rate, and to have a charge declared in his favour on the respondents' interests in the mortgaged property. The judgment of their lordships does not deal with this contention. But the decree passed by them declared that the plaintiff was entitled to recover against the defendants two-thirds of the sum paid by him to redeem the mortgage, with interest at six per cent, per annum from the date of the institution of the suit. We must take it, therefore, that the claim for interest from the .date of redemption was disallowed. It seems to us reading Section 95, that the redeeming co-mortgagor is only given a charge for his portion of the expenses properly incurred in so redeeming and obtaining possession of the mortgaged property. Consequently his claim to interest on the expenses so incurred must arise, if at all not from the section, but from some other ground. If, for instance, he gave notice to the co-mortgagors that he had redeemed the property, and that he had a statutory charge for his proportion of the expenses so incurred, he might also give them notice that he would claim interest against them on that amount if they wished to redeem their shares. But, if no such notice is given, it is difficult to see on what the claim for interest could be founded, or from what authority the Court could derive the power to exercise a discretion to allow interest.

8. We think, therefore, that we must allow the appeal to this extent, that defendant No. 3 must pay the plaintiff Rs. 66-10-8 as his share of the mortgage money with

interest at six per cent, thereon from the date of suit till payment. Defendant No. 3 can have three months to pay the amount from the time the proceedings are returned to the trial Court.

9. No order as to costs of the appeal.

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