

Wasiq Ali Khan vs Nand Kishore And Ors. on 26 August, 1953

Equivalent citations: AIR1954ALL119, AIR 1954 ALLAHABAD 119

JUDGMENT

Malik, C.J.

1. The facts of this case are very simple, but it raises a point of law of some interest, as there are no clear decisions on the point.

The plaintiff-appellant is the mortgagor who filed a suit for redemption of a mortgage with possession. That suit was decreed on 24-7-1934 on payment of Rs. 6221/-. A decree under Order 34, Rule 7 for redemption of the mortgage was passed and the decree-holder was given six months' time to pay the amount. The decree-holder mortgagee thereupon deposited Rs. 6221/- and on the deposit being made in accordance with the provisions of Order 34, Rule 7, a final decree for redemption was passed and the plaintiff-decree-holder was put in possession of the property.

The money, however, remained in deposit in the Court as the defendants did not choose to withdraw it. The defendants filed an appeal, which was allowed on 16-4-1941. It was held that the mortgage had become time-barred on the date of the suit and the plaintiff could not, therefore, get a decree for redemption. Thereafter the defendants applied under Section 144, Civil P. C. for restoration of possession and also claimed mesne profits for the period during which they had been out of possession. The plaintiff raised various pleas. One of the pleas raised by the plaintiff was that they were not entitled to any mesne profits as during the period that they were out of possession, the sum of Rs. 6221/- had remained deposited in Court and they could have easily withdrawn that amount. The lower Courts have held that the defendants were not bound to withdraw the sum of Rs. 6221/- and have allowed them mesne profits, calculating the amount on the basis of gross rental. The plaintiff was, however, allowed 10 per cent. as collection charges and was given credit for the amount paid by him as land revenue and interest on the balance of the income payable to the defendants was also charged. A sum of Rs. 1957/12/5 was found due from the plaintiff to the defendants.

2. In this second appeal the point urged is that in allowing mesne profits, the amount which the defendants would have earned on the sum of Rs. 6221/- if they had withdrawn the amount, should be deducted. Learned counsel for the defendants, however, has urged that the defendants were not bound to withdraw the amount and as they did not withdraw it, the income that might have been earned from that amount should not be taken into consideration in working out the mesne profits.

Several cases have been cited at the Bar, but barring certain observations in -- 'Daluram v. Ramanand', AIR 1929 Pat 533 (A) the other cases are not very helpful. -- 'Sitaramayya v. Venkanua', A. I. R. 1942 Mad 156 (B) is a decision of a Bench of the Madras High Court where A had obtained a

decree against R for a sum of money. R appealed. A did not apply for execution but K in anticipation of such an application asked for stay of execution. The stay was granted on his furnishing security to the satisfaction of the Court in the amount of the decree. As R was not able to furnish security, he deposited the whole amount in cash which remained lying in Court. R's appeal was allowed and the suit filed by A was dismissed. Thereupon R became entitled to withdraw the money that he had deposited. He filed an application under Section 144 for restitution and claimed interest. The Court held that if the respondent had suffered any loss, the blame rested on him and he could not claim that A should be made to make up the loss. The learned Judges pointed out that A had not even applied for execution of the decree and he was not responsible either for the deposit or for the money remaining idle in Court for the period during which the appeal had remained pending.

The other case, viz., -- 'Ma Tok v. Maung Mo Hnaung', A. I. R. 1925 Rang 215 (C), is also not very helpful. In that case A had obtained a decree against B. In execution of the decree B's property was sold and purchased by X. X deposited the money in Court. The sale was, however, not confirmed, with the result that X was not able to obtain possession of the property. On appeal to the Privy Council, the decree passed in A's favour was set aside, with the result that the sale fell through. The auction-purchaser then claimed that she had suffered damage as her money had remained in deposit in Court and she was entitled to be compensated and claimed interest. Nobody had the benefit of the money that she had deposited and no party was responsible for her having made the deposit. In the circumstances the learned Judges held that it will not be equitable that either party to the suit should be ordered to pay interest on the money to the auction-purchaser.

In -- 'Dalu Ram v. Ramanand (A)', (ante), the decree-holder had put his decree under execution. The judgment-debtor filed an appeal and an application for stay. He got a stay on deposit of the whole of the decretal amount, which amount, however, he did not want to be paid over to the decree-holder without his furnishing sufficient security for its refund. The decree-holder was not able to furnish security, with the result that the amount remained lying in Court for some time. The appellate Court allowed the appeal and set aside the decree. When withdrawing the amount deposited, the judgment-debtor claimed that the decree-holder must pay him interest as he had suffered loss by reason of the amount having been deposited in Court. The learned Judges rejected the claim for interest for a part of the period and in considering the question as to the meaning of the words "mesne profits" and how the equities were to be worked out, the learned Judges made the following observation :

"If he (the decree-holder) could with ordinary diligence have received the amount, there is no reason why he would not be liable to pay interest to the party who was by reason of his action deprived of the benefit of his money. In the present case our attention is drawn by the learned advocate for the appellant to the fact that the judgment-debtor had raised an objection to his withdrawal of the money. It appears that the judgment-debtor did really file an objection petition out this was dismissed on 29-3-1324. So up to that date even with ordinary diligence the decree-holder could not have withdrawn the decretal amount deposited by the judgment-debtor, out alter that it he was diligent in the ordinary way, the money was certainly available to him."

They, therefore, allowed interest to the respondent from the date when the money became available to the decree-holder till its repayment.

3. It is not necessary for us to consider in this case whether if a judgment-debtor has deposited money in Court and the decree-holder does nothing to withdraw that amount, the decree-holder thereby becomes liable to pay interest by way of damages to the judgment-debtor and to make good to the judgment-debtor any loss that he might have suffered by reason of the deposit. The position in this case is slightly different. Here the successful defendants are claiming mesne profits from the plaintiff for the period during which they had been deprived of possession, of the property under the decree of the trial Court. These mesne profits have to be worked out according to the principle of justice, equity and good conscience, there being no other guide for the purpose. In working out the figures, it appears that the loss suffered by the defendants could have been mitigated by them to some extent if they had withdrawn the amount which had been deposited and by reason of which deposit they had been deprived of possession of the property. It is not shown to us that the withdrawal of the amount would have, in any manner, prejudiced the defendants' case. In the circumstances, it appeals to us that they voluntarily suffered part of the damage by allowing the money to remain in deposit in Court when they could have easily withdrawn the amount. In calculating mesne profits, therefore, the Courts can take that fact into consideration and allow them only such damage as they did not suffer voluntarily. In our view, therefore, from the sum of Rs. 1957/12/5 interest at the rate of 6 per cent., the rate at which, interest has been, allowed the defendants from the plaintiffs, should be allowed on the sum of Rs. 6221/- from the date of dispossession to the date of restitution of possession of the property to the defendants and if the amount exceeds the sum of Rs. 1957/12/5, the-defendants will not be entitled to claim any mesne profits. The defendants were dispossessed on 11-8-1935, and as the appeal was allowed by this Court on 16-4-1941, the possession of the property must have been restored to the defendants on some date after the decision of the appeal. The interest on the sum of Rs. 6221/- for this period at the rate of interest mentioned by us exceeds Rs. 1957/12/5-and therefore the defendants are not entitled to claim any amount as mesne profits.

4. The result, therefore, is that this appeal is allowed, the order of the lower Court directing; the sum of Rs. 1957/12/5 to be paid to the defendants as mesne profits is set aside. In the circumstances of the case we are not prepared to allow any costs to either party. The parties will, therefore, bear their own costs throughout.