

APPELLATE CIVIL.

Before Teunon and Richardson JJ.

1918

June 6.

SITA NATH GHOSE

v.

THAKURDAS CHAKRAVARTY.*

Mortgage—Covenant of possession by the mortgagee in lieu of interest—Mortgage wrongfully kept out of possession of mortgaged property—Interest—Charge on mortgaged property—Limitation Act (IX of 1908), Sch. I, Arts. 116, 132—Transfer of Property Act (IV of 1882). s. 72.

A mortgage deed expressly covenanted that the mortgagee should have possession of the mortgaged property in lieu of interest and that, if the mortgagors failed to pay the amount of the debt at the end of the period specified, the mortgagee should be at liberty to foreclose according to law. Except for one year, the mortgagee in spite of his efforts was wrongfully kept out of possession by the mortgagors. In a suit brought by the mortgagee on the mortgage deed :—

Held, that the mortgagee was clearly entitled to some interest as a charge on the property, and the interest claimed was not excessive.

Raja Oodit Parkash Sing v. Martindell (1), *Pargun Pandey v. Mahatam Mahto* (2), *Partab Bahadur Singh v. Gajadhar Baksh* (3) and *Moti Singh v. Ramohari Singh* (4) referred to.

Mahadaji v. Joti (5) distinguished.

SECOND APPEAL by Sitanath Ghose, the defendant No. 10.

Four brothers, Banamali Mondal, Khiridhar Mondal Srinath Mondal and Trailokya Nath Mondal, were the

* Appeal from Appellate Decree, No. 2455 of 1916, against the decree of H. P. Duval, Additional District Judge of 24-Parganas, dated May 25, 1916, confirming the decree of Lata Behari Bose, Subordinate Judge of Alipore, dated May 30, 1914.

(1) (1849) 4 Moo. I. A. 444.

(4) (1897) I. L. R. 24 Calc. 699.

(2) (1907) 6 C. L. J. 143.

(5) (1892) I. L. R. 17 Bom. 425.

(3) (1902) I. L. R. 24 All. 521 ;

L. R. 29 I. A. 148.

holders of a certain *jungelburi mourasi mokarari* tenure under one Srimati Pannamoyee Debi. On the 30th Baisak, 1301, corresponding with the 12th May, 1894, the four brothers abovenamed executed a registered *kat kabala* mortgage deed in respect of their interest in the said tenure for Rs. 800 in favour of one Thakurdas Chakravarty. It was stipulated in that bond, *inter alia*, that the mortgagee should be in possession of the mortgaged property in lieu of interest and that the mortgagors should pay off the principal at the end of the year 1307 and in default of payment the mortgagee should be at liberty to foreclose according to law. The mortgagee, however, was unable to get possession except for the period of one year, viz., 1311, notwithstanding his endeavours to do so, for the mortgagors wrongfully kept him out of possession of the mortgaged property. In 1906, Srimati Pannamoyee Debi instituted a suit against the mortgagors for rent in respect of the mortgaged property and obtained a decree for Rs. 562-13-6. On the 22nd Chaitra, 1314, corresponding with the 4th April, 1908, the mortgagee paid the decretal amount in order to save his interest under the mortgage deed from being sold by Srimati Pannamoyee Debi in execution of her rent decree. In 1910 Srimati Pannamoyee Debi again instituted a suit for rent and obtained a decree on compromise and, on the 28th Bhadra, 1318, corresponding with the 14th September, 1911, she purchased the mortgaged property at the auction sale in execution of the latter decree. On the 1st Baisak, 1320, corresponding with the 14th April, 1913, the said mortgagee, Thakurdas Chakravarty, instituted the present suit for recovery of the principal debt of Rs. 800 due on the mortgage with interest at the rate of 12 per cent. per annum, crediting against the interest the rent which he realised during the year 1311, and

1918

SITA NATH
GHOSEv.
THAKURDAS
CHAKRA-
VARTY.

1918

SITA NATH
GHOSEv.
THAKURDAS
CHAKRA-
VARTY.

for recovery of Rs. 562-13-6 the said decretal amount, with interest at 9 per cent. per annum, aggregating the sum of Rs. 2,000, the money to be realised either by foreclosure or by sale of the property concerned. He brought the suit against Banamali Mondal, one of the original mortgagors, the legal representatives of the remaining three original mortgagors and Srimati Pannamoyee Debi and subsequently added as defendant one Sitanath Ghose, the purchaser of the mortgaged property under two deeds, dated respectively, the 18th November, 1902, and the 17th April, 1914. Both Courts below decreed the suit for foreclosure. Sitanath Ghosh, thereupon, appealed to the High Court.

Babu Tarakeswar Pal Chowdhry, for the appellant. There was no covenant between the parties to the effect that after due date interest would be charged on the principal debt. If there had been such a covenant, interest would have been chargeable under the Interest Act; but under the circumstances of this case the Interest Act did not apply. If, however, it were held that the plaintiff was entitled to interest, he should have claimed interest by way of damages [*Khetra Mohan Poddar v. Nishi Kumar Saha* (1)] and such interest would be allowed under Article 116 of the Limitation Act, 1908, only for the period of 6 years prior to suit. Furthermore, the interest was not a charge on the property. As regards the decretal sum of Rs. 563, this also was not a charge on the property. Section 72 of the Transfer of Property Act covered cases where the mortgagee was in possession and that section was not applicable to the present case.

Dr. Dwarka Nath Mitter (with him *Babu Debendra Nath Monlal* and *Babu Hiron Chandra*

Mitter), for the respondent. The first point did not arise. On the construction of the bond it was clearly contemplated that the mortgagor should pay interest and the plaintiff was, therefore, entitled to claim interest after due date. If that construction were not accepted, then see O. XXXIV, r. 4 of Civil Procedure Code. Whether interest was provided for or not in the deed, it must nevertheless be regarded as a charge on the mortgaged property and a part of the mortgage debt. There was no substantial difference between compensation, or interest by way of damage, and interest on the mortgage debt: see Ghose's Law of Mortgage, 4th Edn., p. 502, and *Chajmal Das v. Brij Bhukan Lal* (1) in support of this contention. In *Mathura Das v. Raja Narindar Bahadur* (2), the observations of the Judicial Committee were in the nature of *obiter dicta*. As regards the second point, section 72 of the Transfer of Property Act was not exhaustive and the payment by the mortgagee of the decretal amount to prevent the properties being sold in execution of the rent decree entitled him to add that sum to the charge already on the properties. *Rakho-hari Chattaraj v. Bipra Das Dey* (3), *Upendro Chandra Mitter v. Tara Prosanna Mukerjee* (4) were relied on in support of this contention.

Babu Tarakeswar Pal Choudhry, in reply. In the deed itself there was a specific clause that there would be no charge for interest. The facts in *Chajmal Das v. Brij Bhukan Lal* (1) were quite different to those of the present case.

Cur. adv. vult.

RICHARDSON J. The mortgage in this case was a mortgage which combined the incidents of a

(1) (1895) I. L. R. 17 All. 511.

(2) (1896) I. L. R. 19 All. 39.

(3) (1904) I. L. R. 31 Calc. 975.

(4) (1903) I. L. R. 30 Calc. 794.

1918

SITA NATH
GHOSE

v.
THAKURDAS
CHAKRA-
VARTY.

1918

SITA NATH
GHOSE
v.
THAKURDAS
CHAKRA-
VARTY.
—
RICHARDSON
J.

mortgage by way of conditional sale with the incidents or one of the incidents of a usufructuary mortgage. It was expressly provided that the mortgagee, the plaintiff in this suit, should have possession of the mortgaged properties in lieu of interest. The mortgage debt was payable at the end of 1307 and it was further expressly provided that in default of payment the mortgagee should be at liberty to foreclose according to law.

The plaintiff, it is found, was wrongfully kept out of possession by the mortgagors or their then representatives and only secured possession during one year, 1311.

While he was out of possession, he paid a sum of Rs. 562-13-6 to prevent the mortgaged property from being sold in execution of a decree for arrears of rent obtained by the superior landlord.

He instituted the suit on the 14th April, 1913 (1st Baisak, 1320), which, unless anything had occurred to give a fresh starting point, was the last day of the period of twelve years allowed by Article 132 of the Limitation Act. By his plaint he sought to recover the principal debt Rs. 800 with interest at 12 per cent. per annum, crediting against interest the rent which he had realised during 1311. He further claimed under section 72 of the Transfer of Property Act to add to the amount secured the sum of Rs. 562 with interest at 9 per cent. per annum. The total amount claimed was Rs. 2,000 in respect of which the Courts below have concurred in giving the plaintiff a decree for foreclosure in the usual form.

The mortgagors have not appealed. The appellant before us is the defendant No. 10 in the suit, who purchased the mortgaged properties by two conveyances subsequent to the mortgage.

The decrees of the Courts below are not seriously contested so far as the principal debt and the sum of

Rs. 562 with interest on that sum are concerned. It is contended, however, on the authority of the decision of the Bombay High Court in *Mahadaji v. Joti* (1), that the plaintiff is not entitled to interest on the principal. The facts are not fully stated in the report, but if the learned Judges intended to lay down any general principle the case may be distinguished on the ground on which the learned District Judge has distinguished it. It is said in the judgment that the plaintiff "never took the trouble to obtain possession." In the present case, as I have said, the finding is that the plaintiff was wrongfully kept out of possession. In spite of his efforts he was only able to secure possession for one year. There was no waiver or acquiescence as there was in *Partab Bahadur Singh v. Gajadhar Bakhsh* (2).

Then it was said that if the plaintiff is entitled to interest at all, he can only claim interest by way of damages under the Interest Act, and the Full Bench decision of this Court in *Moti Singh v. Ramohari Singh* (3) is cited as authority for the proposition that such interest is payable only for the six years before suit. But in that case it was held on the construction of the contract, that it disclosed no intention to provide for interest after the due date. That was the ground of the decision and Maclean C. J. was careful to point out that "if *post diem* interest be provided for, it is just as much a charge on the property as the principal" and that "in such a case Article 132 of the Limitation Act would apply."

Here the contract clearly contemplated the payment of interest after the due date by the perception of profits. The plaintiff was to retain possession till

(1) (1892) I. L. R. 17 Bom. 425. (3) (1897) I. L. R. 24 Calc. 699.

(2) (1902) I. L. R. 24 All. 521 ;

L. R. 29 I. A. 148.

1918

SITA NATH
GHOSE

THAKURDAS
CHAKRA-
VARTY.

RICHARDSON
J.

1918
 SITA NATH
 GHOSE
 v.
 THAKURDAS
 CHAKRA-
 VARTY.
 RICHARDSON
 J.

the capital was repaid. The plaintiff is clearly entitled to some interest as a charge on the property and the interest allowed does not seem excessive. This seems to me to be in accordance with principle. In *Raja Oodit Purkash Sing v. Martindell* (1), there was a similar mortgage with a covenant for possession. Possession having been withheld, interest at 12 per cent. per annum was allowed without any question being raised. There is nothing in the Transfer of Property Act to suggest or compel a contrary view. The case of *Pargan Pandey v. Mahatam Mahto* (2) may be cited, though in that case it was expressly agreed that in case of dispossession interest should run at the rate of 15 per cent. per annum.

It is true that the plaintiff might have instituted a suit for the possession of the mortgaged property, or he might have sued for the mortgage money at once under section 68 of the Transfer of Property Act. He was not obliged to take the former course, nor was he obliged under section 68 to sue at once. It was open to him to bring the present suit within the period allowed by the law of limitation. The suit is in effect a suit under section 68 read with section 67. In the circumstances section 68 makes the "mortgage money" payable. By definition "mortgage money" includes interest and after the mortgage money becomes payable a suit may be brought under section 67.

In my opinion the appeal should be dismissed with costs.

TEUNON J. I agree.

Appeal dismissed.

O. M.

(1) (1849) 4 Moo. I. A. 444.

(2) (1907) 6 C. L. J. 143.