

**PRIVY COUNCIL.**

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JAGANNATH PROSAD SINGH CHOWDHURY  
(DEFENDANT)

v.

SURAJMAL JALAL AND OTHERS (PLAINTIFFS).

P. C.<sup>s</sup>  
1925  

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Oct. 19.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

*Mortgage—Decree—Interest—Date to which interest runs at stipulated rate—  
Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2, 4.*

On a preliminary decree for foreclosure or sale under Order XXXIV, rr. 2, 4 of the Code of Civil Procedure, 1908, a mortgagee is entitled to interest at the rate, and with the rests, stipulated in the mortgage down to the date fixed for redemption by the decree; and if the decree is varied on appeal, down to the date fixed for redemption by the Appellate Court.

*Quære*: if the Appellate Court merely affirms the decree.

*Sundar Koer v. Rai Sham Krishen* (1) followed.

*Raghunath Prasad v. Sarju Prasad* (2) explained.

APPEAL (No. 108 of 1925) from a decree of the High Court (December 5, 1923) which varied a decree of the Subordinate Judge of Howrah.

The suit was brought by the first three respondents to enforce by sale a mortgage bond dated May 2, 1907. The plaintiffs were assignees of the mortgage debt. The bond provided for interest at 12 per cent. per annum with quarterly rests.

The issues framed on the pleadings included:  
(3) was the bond executed under undue influence?

<sup>o</sup>Present: LORD PHILLIMORE, LORD SINHA, LORD BLANESBURGH,  
AND MR. AMBER ALL.

(1) (1906) I. L. R. 34 Calc. 150; L. R. 34 I. A. 9.

(2) (1923) I. L. R. 3 Pat. 279; L. R. 51 I. A. 101.

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(5) Is the stipulation for interest and compound interest illegal, void and unconscionable?

The Subordinate Judge found all the issues in favour of the plaintiffs except issue 5. He allowed interest at 9 per cent. until the date of the institution of the suit, and 6 per cent. from that date until payment.

The defendant-appellant did not appeal, but the plaintiffs-respondents appealed as to the interest allowed. The High Court (Chatterjea and Cuming JJ.) allowed the appeal, and made a decree for interest at 12 per cent. per annum with quarterly rests, as stipulated in the bond, to the date fixed by the decree for payment, and thereafter at 6 per cent. per annum.

*Sir George Lowndes K. C.* and *Dube*, for the appellant, referred to *Raghunath Prasad v. Sarju Prasad* (1), *Mangniram Murwari v. Dhowtal Roy* (2), *Sunder Koer v. Sham Krishen* (3) and Order XXXIV, rr. 2, 3, 4.

*Dunne K. C.* and *Sen*, for the respondent-plaintiffs were not called upon.

The judgment of their Lordships was delivered by:—

LORD PHILLIMORE. On this appeal as it was lodged various points were presented which have not been insisted upon in argument before their Lordships' Board. The one matter to which counsel for the appellant have confined themselves is the question of the rate of interest and whether it should be simple or compound from the date either of the decree of the High Court or, as put by one of the learned counsel, the decree of the Court of first instance.

(1) (1923) I. L. R. 3 Pat. 279, 287 ; L. R. 51 I. A. 101, 108.

(2) (1886) I. L. R. 12 Calc. 569.

(3) (1906) I. L. R. 34 Calc. 150, 161 ; L. R. 34 I. A. 9, 21.

Really this matter is determined beyond question by Order XXXIV of the Code of Civil Procedure. This may, for this particular case of mortgages, differ from the general provision of section 34 of the Code; but if so, the particular avoids the general. Under rule 2 of that Order it is provided:—

“In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree (a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to . . . and directing (c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession . . . but (d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.”

And rule 4, sub-rule (1), provides that in a suit for sale, if the plaintiff succeeds, the Court shall pass a decree as mentioned and then direct that the property shall be sold if it is not redeemed.

That is very well paraphrased by Lord Davey in delivering the judgment of the Board in the case of *Rani Sundar Koer v. Rai Sham Krishen* (1), he says:—

“Their Lordships have no hesitation in expressing their concurrence with the High Court of Calcutta, not only in allowing interest after the fixed day, but also in allowing interest at the Court rate and not at the mortgage rate. They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree.”

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Up to this point, till the period for redemption has expired, the matter remains in contract and the interest has to be paid at the rate and with the rests specified in the contract of mortgage. That is the judgment which the High Court has delivered and of which complaint is, in their Lordships' opinion, ineffectually made.

A point was taken that the date when the contract rate expired should be six months from the date of the original decree of the Subordinate Judge, and not six months from the date of the decree of the High Court. Their Lordships think that cannot be so. It might be so if the decree and judgment of the Court of first instance was one which was affirmed; but, inasmuch as it was varied because the sum fixed for redemption was incorrectly calculated it is impossible for the appellant, in whose favour that incorrect judgment was given, to rely upon that date as the date from which the redemption period should be calculated.

"Their Lordships therefore are of opinion that the decision of the High Court is in all respects correct; but their Lordships must deal with a point which has been made by counsel for the appellant upon the decision of this Board in the case of *Raghunath Prasad v. Sarju Prasad* (1). No doubt in that case their Lordships finished their judgment, which was a judgment in favour of the respondents, who had not been called upon, by saying :—

"Their Lordships are of opinion that the decree of the High Court " should be varied by allowing compound interest on the principal at the " rate of 2 per cent. per mensem from the date of the execution of the " bond until September 25th, 1917"—which was the date [of the decree of the Court of first instance, not of the redemption period—

(1) (1923) I. L. R. 3 Pat. 279, 287 ; L. R. 51 I. A. 101, 108.

“and thereafter simple interest at the rate of 6 per cent. per annum up to the date of realisation, and that in other respects the decree of the High Court should be affirmed.”

This part of the decision does not apparently square with either the order or the language of this Board in the case of *Rani Sundar Koer v. Rai Sham Krishen* (1). The explanation must be that, for some reason or other, their Lordships thought that the respondents, who were doing very well, were prepared to leave this particular matter in their Lordships' hands. If the respondents, when their counsel received the print of the judgment, had been so minded as to come to the Board and say that this had passed *per incuriam* they would have been heard and the matter would have been fully discussed.

Their Lordships cannot have thought that they were deciding adversely to the respondents or they would have called upon their counsel to argue. What exactly influenced their Lordships at this moment of time can only be conjectured, but for some reason or other they must have thought that the respondents consented to leave this matter in their hands, and the case is not to be relied upon as an authority in this particular.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellant: *Watkins & Hunter*.

Solicitors for the respondents: *Barrow, Rogers & Nevill*.

(1) (1903) I. L. R. 34 Cal. 150; L. R. 34 I. A. 9.