ORIGINAL CIVIL.

Before Lort-Williams J.

1936

June 17.

CALCUTTA IMPROVEMENT TRUST

v.

POORNA CHANDRA SINGHA.*

Mortgage—Increased rate of interest on failure of punctual payment—Penalty—Relief against penalty.

A provision in a mortgage deed that there shall be an increase in the rate of interest if the interest remains unpaid for more than fifteen days after the date of payment is a penalty against which the Courts will grant relief.

Wallingford v. *Mutual Society* (1) followed.

ORIGINAL SUIT.

The facts of the case and arguments of counsel appear fully from the judgment.

S. K. Gupta and *Page* for the plaintiffs.

H. D. Bose and *Arun Sen* for the defendant Poorna Chandra Singha.

LORT-WILLIAMS J. The plaintiffs in this case are the Trustees for the Improvement of Calcutta. There are three defendants. Poorna Chandra Singha, the first defendant, is the only one who contests the suit. By a registered Indenture of Mortgage dated March 14, 1927, made between the plaintiffs and the first defendant, the first defendant mortgaged by way of first charge a piece of land, to secure payment of Rs. 36,250 being the price payable by him to the plaintiffs for the purchase of the said property, with interest and costs, as provided in the deed.

*Original Suit No. 1747 of 1935.

(1) (1880) 5 App. Cas. 685.

The deed provides *inter alia* that the first defendant shall pay a yearly rent charge of Rs. 2,175, representing interest on the said sum of Rs. 36,250 at 6 per cent. per annum, on the first day of April in every year. That if this payment remains unpaid for 15 days, then the whole sum of Rs. 36,250 shall become due and payable with interest thereon at 6½ per cent. and that it shall be lawful for the plaintiffs to enter into and upon and to hold all or any part of the mortgaged property and to proceed to a sale thereof by public auction or private contract.

The first defendant paid the yearly interest up to March 31, 1931. He failed to pay interest as it became due on April 1, 1932, and April 1, 1933, respectively, and the mortgaged property was advertised for sale on January 20, 1933, and February 16, 1934, respectively, but was withdrawn from sale on each occasion because the first defendant paid up the interest in arrear and costs. He again failed to pay the interest which became due on April 1, 1934, and the property was advertised for sale, but could not be sold owing to the absence of bidders. The plaintiffs were put to the expense of Rs. 369-12.

The plaintiffs say, therefore, that there is now due and owing the sum of Rs. 42,119-5, and they ask for a mortgage decree in respect of the mortgaged property in terms of Form 5A of the Code of Civil Procedure.

Mr. Bose on behalf of the first defendant has admitted the acts alleged by the plaintiffs, and that the sum claimed is due, except that he disputes that the plaintiffs are entitled to charge 6½ per cent. interest, and/or the sum of Rs. 369-12 for the costs of the infructuous sale. Further, he disputes that the plaintiffs are entitled to a personal decree against the first defendant.

Unfortunately for the plaintiffs, the mortgage deed was, in my opinion, inefficiently drafted. It

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recites in the first place that in the conveyance executed prior to the mortgage deed, it was provided that the payment of the purchase money should stand out at 6 per cent. interest per annum, the owner executing therefore in favour of the plaintiffs a yearly rent charge of Rs. 2,175, that is, it provided that interest upon the purchase price should be at the rate of 6 per cent. Later on it provides that if the yearly payment of interest should remain unpaid for 15 days after the date when it ought to have been paid, then the whole sum of Rs. 36,250 should become due and payable with interest thereon at the rate of 6½ per cent. per annum, that is, it provides that there shall be an increase in the rate of interest if the interest remains unpaid for more than 15 days.

So far as I know, it has always been, and is now, the law that, as stated in Vol. 21, Halsbury's Laws of England, at p. 116, para. 208:—

> An agreement for increasing the rate of interest on failure in punctual payment is regarded as a penalty against which the Courts will grant relief.

The authorities for this proposition are a number of old cases referred to in the note to that paragraph and one as recent as the year 1880, *Wallingford* v. *Mutual Society* (1). It has been argued, however, on behalf of the plaintiffs that that proposition is no longer good law, and I have been referred to Coote On Mortgages, 9th ed., vol. 1, at p. 155, where the learned author says that—

> an agreement that the rate of interest shall be raised if interest at the normal rate be not punctually paid, is still regarded as being of the nature of a penalty, and to be relieved against even in case of gross default;

and he refers to the cases which I have just referred to, and others. But he goes on to say that—

> It may be doubted whether such a stipulation is any longer invalid.

(1) (1880) 5 App. Cas. 685, 702.

This point he deals with at p. 158 of the same volume when dealing with the question of provisos for capitalization of interest or for payment of compound interest. His argument is that the old rules of law with regard to these matters depended on the usury laws, and that relief was given by the Court because such provisions tended to usury, and that owing to the repeal of the usury laws these considerations were no longer valid. He contends that—

> It is difficult to distinguish on principle a stipulation capitalizing interest from a covenant to pay a higher rate of interest on default of punctual payment, which latter covenants have, as we have seen, been hitherto invariably relieved against as clogging the equity of redemption.

Then he tentatively suggets:—

> It may be that there is no longer any objection either to such a stipulation or to such a covenant, and both would seem to fall within the principle laid down in *Bradley* v. *Carritt* (1) that a stipulation, if not oppressive, will be valid, provided that it comes to an end when the mortgage is paid off.

He is, however, driven to admit that though—

> Inferentially the old rule against compound interest is abrogated, with one exception there is no direct authority on the point.

That one exception is perhaps irrelevant because it seems to have been decided upon another point.

The edition to which I have just referred was published in 1927, but in Fisher and Lightwood's Law of Mortgage, 7th ed., published in 1931, there is no reference to the considerations advanced by the author of Coote On Mortgages. On p. 745 the learned author states:—

> It is a well-settled, if not an intelligible rule, that if the mortgagee wishes to stipulate for a higher rate of interest in default of punctual payment, he must reserve the higher rate as the interest payable under the mortgage, and provide for its reduction in case of punctual payment; and he cannot effect his object by reserving the lower rate, and making the higher the penalty for non-payment at the appointed time; because, it is said, an agreement of the latter kind, being *nomine pœnæ* is relievable in equity,

(1) [1903] A. C. 253.

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and he relies upon the same authorities to which I have referred already.

The result is that although I agree with the criticism of this learned author that the rule does not appear to be very intelligible, undoubtedly it is a rule of law which has been followed for so many years that it does not seem possible to alter it except by process of legislative enactment.

The result, on this point, is that the interest charged must be reduced to 6 per cent.

With regard to the costs of the infructuous sale, the mortgage deed provides, as I have already stated, that the plaintiffs may upon default proceed with sale of the property by public auction or private contract. This they did, and incurred these costs. The sale was infructuous, and now, instead of proceeding to a second sale under the provisions of the deed, they have brought a suit asking the Court to grant a mortgage decree. I should have thought that the plaintiffs were precluded from bringing this suit once they have exercised their option to proceed to a sale under the terms of the deed, but the defendant has not taken this point, and, therefore, I need not consider it; but in my opinion it is clear from what has happened that the plaintiffs ought to have brought their suit in the first place, and not have wasted these costs and then come to Court and ask for a decree. For these reasons, I hold that they are not entitled to charge this sum of Rs. 369-12 against the first defendant.

With regard to the question of a personal decree, Form No. 5A provides in para. 5 that if the money realised by sale shall not be sufficient for payment in full of the amount payable to the plaintiff, he shall be at liberty to apply for a personal decree against the defendant for the amount of the balance. That means only that the present decree will give the plaintiff leave to apply for a personal decree; but Mr. Bose

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on behalf of the first defendant desires me to make it clear that at this moment I am not deciding the question whether there ought to be a personal decree against the first defendant. That question will be agitated in future if and when the plaintiffs see fit to make an application to the Court under the paragraph of the Form to which I have referred.

With these modifications there will be a decree in terms of the prayer of the plaint.

The buildings erected on the mortgaged premises are accessions to the mortgaged property, and the plaintiffs are entitled to them as mortgagees.

Suit decreed.

Attorneys for plaintiffs: *Sandersons & Morgans.*

Attorney for defendant: *C. C. Mitra.*

S. M.