

Before Mr. Justice Burkitt and Mr. Justice Aikman.

JANKI DAS (PLAINTIFF). v. AHMAD HUSAIN KHAN AND OTHERS
(DEFENDANTS).*

1902
November
19.

Mortgage—Suit upon mortgage against mortgagor and subsequent transferee—Failure of plaintiff to prove as against transferee that the consideration entered in the bond was correct—Such failure considered in favour of the mortgagor, though evidence was not tendered by him on the point—Act No. IX of 1872 (Indian Contract Act), section 74—Penalty—Compound interest in lieu of simple.

In a suit for sale on a mortgage a subsequent transferee of a portion of the mortgaged property, who was made a defendant, put the plaintiff to proof of his mortgage, and he failed to establish that the actual consideration for the mortgage was any more than about two-thirds of the consideration entered in the bond. The mortgagor himself had offered no evidence to rebut the inference derivable from his own previous statements and conduct that he had received the full consideration stated in the bond. *Held* that the mortgagor was nevertheless entitled to the benefit of the finding of the Court in favour of the other defendant. *Makund v. Bahori Lal* (1), referred to.

Held also, following the ruling in *Ganga Dayal v. Bachchu Lal* (2), that a stipulation for the payment of compound interest at the same rate as was payable upon the principal is not a stipulation by way of penalty within the meaning of the explanation to section 74 of the Indian Contract Act, 1872.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji*, for the appellant.

Pandit *Suraj Nath*, for the respondents.

BURKITT and AIKMAN, JJ.—In the suit out of which this appeal has arisen the plaintiff appellant, Lala Janki Das, sued upon a mortgage for Rs. 2,000, executed on the 15th of October, 1887, by one Ahmad Husain. The interest stipulated in the mortgage was at Rs. 1-8-0 per cent. per mensem with half-yearly rests. It was provided that compound interest at the same rate should be charged upon interest unpaid for six months. The defendants Nos. 2 and 3 are the wives of Ahmad Husain, the mortgagor. The defendant No. 4, Prasadi Lal, is a puisne mortgagee holding under the defendant No. 3, Musammat Alijah Begam. Alijah Begam's title is that, in execution of a money decree against her husband, the mortgagor, she purchased at public auction a portion of the mortgaged property.

* First Appeal No. 89 of 1900, from a decree of Babu Achal Behari, Additional Subordinate Judge of Moradabad, dated the 7th of March, 1900.

(1) (1881) L. L. R., 3 All., 824.

(2) Weekly Notes, 1902, p. 178.

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This purchase was subsequent to the mortgage. The defendant No. 2, Musammat Bigga Begam, is impleaded as being a transferee from her husband, the mortgagor, the transfer having taken place subsequent to the mortgage. Neither Bigga Begam nor Prasadi Lal contested the suit in the lower Court, and neither of them has appeared in this appeal. The contesting defendants were the mortgagor and Alijah Begam. Ahmad Husain, the mortgagor, denied the receipt of consideration in full. He pleaded that he had only received Rs. 1,375. He also objected to the plaintiff's claim for compound interest. Alijah Begam put the plaintiff to the proof of his mortgage, the execution of which, and the consideration thereof, she denied. She also raised another plea as to a charge possessed by her, amounting to Rs. 100 per mensem. That plea was overruled by the lower Court, and has not been repeated in this appeal. She also, like her husband, objected to the compound interest as being penal interest. The Subordinate Judge found the mortgage-deed to be genuine, and that the consideration passed was Rs. 1,375 paid before the Registrar. He found that the compound interest was penal, and he gave a decree for Rs. 1,375 with simple interest at Rs. 1-8 per cent. per mensem from the date of the bond to the date of the suit, and thenceforward at Rs. 6 per cent. per annum. The plaintiff appeals.

Three questions were argued before us at the hearing of this appeal; (1) as to Rs. 625 principal disallowed by the Court below; (2) as to whether the compound interest was penal interest and such as should be relieved against; and (3) it was contended that the contractual interest should be allowed up to the date of payment. As to the first plea, there can be no doubt that in face of the admissions made by the mortgagor Ahmad Husain when registering the document, it lay upon him to prove that he had not received the full amount of consideration. He gave no evidence whatever. As to Alijah Begam, the case is different. She was no party to the mortgage-deed. She put, as she was entitled to do, the plaintiff to proof of the mortgage. The plaintiff called certain witnesses to prove the payment of full consideration. The Subordinate Judge found that the plaintiff had failed to prove full consideration and that the

amount paid was that actually paid before the Registrar. We see no reason whatever for doubting that finding, and we affirm it. The question then is, whether we can give a decree for Rs. 2,000 as against the husband, Ahmad Husain, whilst holding that the amount proved to have been actually paid was Rs. 1,375. The lower Court relied upon a ruling of this Court in *Makund v. Bahori Lal* (1). The facts in that case are not exactly similar to those of the present case. But we think the principle laid down therein is one that we should act upon. It seems to us that it would be illogical to hold in one and the same decree that the full amount of consideration was paid as far as the mortgagor, Ahmad Husain, is concerned, and that a smaller sum was paid as far as Alijah Begam is concerned. We think that the mortgagor, Ahmad Husain, is entitled to take advantage of the plaintiff's failure to establish as against Alijah Begam that the consideration paid was Rs. 2,000. Therefore, agreeing with the lower Court, we find that the amount advanced upon the mortgage was only Rs. 1,375.

The next question is that of compound interest. As to that we are unable to say, looking at the language of section 74 of the Contract Act as amended by Act No. VI of 1899, that the stipulation for the payment of compound interest at the same rate of interest as was payable upon the principal is "increased interest" within the meaning of the explanation to section 74 of the Contract Act. This has been held in *Ganga Dayal v. Bachchu Lal* (2). We therefore sustain the appellant's contention that the compound interest claimed is not penal.

As to the third plea urged before us, we are of opinion that the stipulated rate of interest should be allowed up to the date fixed by the lower Court for payment of the mortgage money to avoid sale. No doubt it is open to a Court to allow the contractual rate of interest up to the date of realization. But we have not been shown any authority, nor do we know any, which would make it compulsory upon a Court to pass such an order. The present case is certainly one in which, in the exercise of our discretion, we think we ought not to make the stipulated rate of interest run beyond the date mentioned above. We therefore

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modify the decree of the lower Court by directing that compound interest be calculated upon the principal sum found due namely Rs. 1,375, from the date of the mortgage to the date named in the lower Court's decree, namely the 7th of September, 1900. The calculation should be made with half-yearly rests. To this extent we allow the appeal and vary the decree of the Court below. The parties will pay and receive costs here and in the Court below according to their failure and success in this Court, and the necessary entry as to costs will be made in the new decree that will be prepared under section 88 of the Transfer of Property Act. We fix the 19th of May, 1903, as the date by which the money must be paid to save the property from sale.

Decree modified.

1902
July 11.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Knox.

JAS RAM (PLAINTIFF) v. SHER SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Joint Hindu family—Liability of other members of the family under a mortgage executed by the manager.

Where a mortgage of joint family property has been executed by the managing members of a joint Hindu family, the remaining members of the family are proper parties to a suit for sale based on such mortgage. *Dharam Das v. Angan Lal* (1), *Muhammad Askari v. Radha Ram Singh* (2) and *Lachman Das v. Dattu* (3) referred to.

On the 27th of September, 1885, Sher Singh and Kunjal Singh, who were the managers of a joint Hindu family, executed a mortgage in favour of one Jas Ram to secure a sum of Rs. 350 with interest, and hypothecated a one and a half biswa share in certain property. On the 10th of August, 1886, the same parties mortgaged a one biswa share of the same property to secure a principal sum of Rs. 600 and interest. The mortgagee, Jas Ram, sued the mortgagors on his mortgage of the 10th of August, 1886, and obtained a decree. He subsequently brought a suit for sale on the earlier mortgage, but finding that that suit was defective he withdrew it. He then instituted a third suit upon both the

* Second Appeal No. 24 of 1900, from the decree of B. J. Dalal, Esqr., Additional District Judge of Aligarh, dated the 27th September, 1899, modifying the decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 15th January, 1898.

(1) (1899) I. L. R., 21 All., 301.

(2) (1900) I. L. R., 22 All., 307.

(3) (1900) I. L. R., 22 All., 394.