

JAWAHIR SINGH (PLAINTIFF) v. SOMESHWAR DAT AND OTHERS
(DEFENDANTS).

P. C.
1905
November 28.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mortgage—Construction of mortgage—Clause as to mortgagee accepting profits in lieu of interest qualified by subsequent clause not inconsistent with former one—Liability for compound interest—Sums payable on redemption of mortgage.

A deed of mortgage after providing for payment of interest at a certain rate and stating that "if as a mark of favour the mortgagors let the interest remain unrealized," the principal should be payable with compound interest, stipulated by clause 6 that "if the mortgagee took possession" she will be entitled to receive the net profits . . . in lieu of interest, and during her possession the interest and profits shall be deemed equal." Clause 11 was to the effect that "if during the period of possession of the mortgagee the profits do not cover the amount of interest we the mortgagors will make good the deficiency . . . if we cannot make good the deficiency we will pay it with interest at the rate mentioned above at the time of redemption." The mortgagee took possession under the mortgage.

Held in a suit for redemption that on the construction of the deed, although the *prima facie* meaning of clause 6, namely, that the mortgagee accepted the profits in lieu of interest was no doubt qualified by clause 11, the latter clause was not to be rejected as being inconsistent with the former one.

Held also that the mortgagors were liable to pay compound interest on the deficiency which they undertook to pay by clause 11.

APPEAL from a judgment (June 15th, 1903) of the Court of the Judicial Commissioner of Oudh and an order and decree (August 13th, 1903) of the same Court, which varied a judgment and decree (June 27th, 1901) of the Subordinate Judge of Sitapur.

The main question in this appeal was the construction of a mortgage deed, dated 27th October, 1888, and therefrom deciding on what terms redemption should be allowed to the appellant, the plaintiff in the suit to redeem the mortgage. The mortgage deed was executed by four persons in favour of Musammât Munia, the wife of one Ram Bilas. The mortgagors were represented in the appeal by Dular Singh and Pulandar Singh, respondents 4 and 5: the mortgagee and her husband were represented by their sons, Someshwar Dat and Tirbhuvan Dat, respondents 1 and 2. The properties mortgaged were three pattis in village

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Wazirnagar, the village of Abdipur, and the village of Bislam-nagar. The consideration for the mortgage was Rs. 23,000 and the principal stipulations, so far as they are material to this appeal, were as follows :—

2. The term of this mortgage is fixed as three years.

3. The interest on said amount shall be paid without any objection yearly in the month of Jeth at the rate of Re. 1-3-0 per cent. per mensem.

4. In the event of non-payment of interest yearly the mortgagee will have power either to realize the principal with interest through a Court or get a new deed charging the property executed in lieu of interest. If as a mark of favour the mortgagor lets the interest remain unrealized, then in such case the interest will be added to the principal from the date of its becoming due and interest at the said rate will run on it as if it originally formed part of the principal, and within the term or after it till the date of realization this rate of interest and compound interest shall continue.

5. If the executant be not able to redeem the mortgaged villages within the period after paying the principal, interest and compound interest, they shall put the mortgagee in possession of the mortgaged villages for a period of five years.

6. After taking possession the mortgagee will be entitled to receive the net profits after paying the Government revenue and village expenses, &c., in lieu of interest, and during the time of her possession the interest and profits shall be deemed equal. The mortgagee while in possession will have the powers like ourselves of a proprietor for ejecting the tenants, cultivating *sir* and utilizing wood whether fallen, dry or in the jungle, &c., we the executants will not at the time of redemption claim the said items, *viz.*, the wood, fallen, dried or of the jungle from the mortgagee.

7. If owing to our non-compliance with the terms the mortgagee gets the possession of the property, her possession shall continue for five years, and after the expiry of five years of her possession the said villages will be redeemed when in the month of Jeth, fallow season, the whole of the principal, interest, compound interest, and all dues against the tenants are paid in a lump sum.

11. If during the period of possession of the mortgagee, after depositing the Government revenue and defraying the village expenses, &c., the profits do not cover the amount of interest; we, the mortgagors, will make good the deficiency from our pockets in accordance with the accounts prepared by the agents of the mortgagee. If we cannot make good the deficiency, we will pay it with interest at the rate mentioned above at the time of redemption. The mortgagee is entitled to realize after the term of this deed the whole of her claim according to the terms of this deed, with interest due till then from the mortgaged property as well as from the persons and other property of us, the executants, or from any one of us, the executants, either herself or through Court. We will have no objection whatsoever.

On 13th June, 1892, in consequence of the mortgagors making default in the payment of interest as stipulated, the mortgagee brought a suit for possession of the mortgaged property and on 9th July, 1893, obtained a decree, in execution of which on 16th July, 1893, possession was duly given. The interest of the mortgagors in the three pattis of Wazirnagar was brought to sale in execution of decree by a third party, and on 23rd October, 1893, a half share was purchased by Jawahir Singh the appellant, and the other half share by Ram Bilas. In execution of another decree Jawahir Singh, on 26th May, 1895, purchased the equity of redemption in village Abdipur.

He brought his suit for redemption on 2nd June, 1900, making defendants Someshwar Dat and Tirbhuwan Dat, Dular Singh and Pulandar Singh, and one Gauri Shankar, the second mortgagee of a small portion of Wazirnagar. The plaintiff claimed to redeem the whole of the property mortgaged on payment of principal and interest calculated up to 16th July, 1893, the date on which the mortgagee obtained possession. He contends that on the true construction of the mortgage deed the profits were to be taken in lieu of interest and that the 11th clause of the deed had been fraudulently inserted in it. He also claimed Rs. 2,000 as damages on account of the improper cutting of timber.

The only defence material on this appeal was that of the defendants Someshwar Dat and Tirbhuwan Dat. They made no objection to the redemption of all the property mortgaged except the half share in Wazirnagar purchased by Ram Bilas. They denied the fraud charged and the damage to timber alleged in the plaint and contended that on the true construction of the mortgage deed they were entitled to principal and compound interest as stipulated subject to their liability to account for the profits realized by them whilst in possession.

The Subordinate Judge held that clause 11 was not fraudulently inserted in the mortgage deed; that the plaintiff was entitled to redeem all the mortgaged property except the share purchased by Ram Bilas in Wazirnagar, and that Rs. 100 should be allowed as damages for cutting timber. On the construction of the mortgage deed he held that Someshwar Dat and

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Tribhuvan Dat were entitled to interest at the rate stipulated in the deed up to the date of payment, subject to a liability to account in each year for the profits realized by them during each year since they obtained possession. The Subordinate Judge made a decree for Rs. 73,260-4-3 being the amount he found payable on 27th December, 1901, the day fixed for redemption.

The plaintiff appealed to the Court of the Judicial Commissioner of Oudh, where there was no dispute as to the property which could be redeemed, and the Court affirmed the findings of the Subordinate Judge on the question of fraud, and as to the sum to be allowed as damages for the timber cut and also as to the construction of the mortgage deed. A decree was made for redemption on payment of Rs. 81,958-3-2 in or before 10th February, 1904.

The material portion of the judgment of the Judicial Commissioner's Court on the question of the construction of the mortgage deed was as follows :—

“This brings us to the main contention of the plaintiff, namely, that the 11th clause of the deed, whether inserted by fraud or not, must be rejected as repugnant to the 5th and other clauses, and therefore from the date on which the mortgagee took possession, the profits of the property must under the 5th clause of the deed be taken to have been equivalent to the interest on the sum due at the date of delivery of possession, *i.e.*, according to his contention on Rs. 34,300-3-0.

“The plaintiff in the Court below claimed a decree for redemption of the whole mortgage upon payment of Rs. 34,300 less a small sum said to have been recovered by the mortgagee by sale of trees, &c., or upon payment of a proportionately smaller sum, in case it was found that he could not redeem more than 348 *bighas* in Wazirnagar. This contention has been modified in this Court. Here, his counsel admits what is sufficiently obvious, that upon no construction of clause 6 could it be held that the profits of the property were to be considered as equal to the interest on more than the original principal sum, that is to say Rs. 23,000. If the plaintiff's contention as modified is accepted, the amount now due upon the mortgage is the sum due on July 16th, 1893 (in our opinion, Rs. 39,699-10-2), with compound interest at the rate of 14½ per cent. per annum on Rs. 16,699-10-2. Even so, the amount payable probably far exceeds the value of the property, and the price which the plaintiff is prepared to pay; but as the parties are not agreed as to its value, it is necessary to deal with the various points involved in the plaintiff's contention.

“Upon the question of fraud we agree entirely with the Court below; there is no evidence upon which the charge of fraud could be held to be

established. The statement of Sheo Singh, the only surviving mortgagor, shows that he knew that clause 11 was in the deed before the deed was registered.

"The next question is whether clause 11 should be rejected as repugnant to the rest of the deed. It must be conceded that clause 6, the last part of clause 7, clause 9 and clause 13 are all consistent with an intention that the profits should be considered as equivalent to the interest, but if it is possible, the deed should be construed so as to avoid the conclusion that one part is repugnant to another, and the rule that as between two repugnant clauses the earlier should be received, and the latter rejected is applied only when there is no special reason to the contrary and only in the last resort, if the Court can find nothing else to assist it in determining the question. Now in the first place the evidence shows that at the date of the mortgage, the net profits cannot have exceeded Rs. 1,700, while the interest on the principal sum was Rs. 3,276. It cannot have been in the contemplation of the parties that the mortgagee should on taking possession forego as much as Rs. 1,500 per annum. In the next place, clause 6 is not in the form usually employed, when the parties to a mortgage contract that the profits shall be taken in lieu of interest, the parties taking the risk of their being less or more. In such cases it is always provided in express terms that the parties have agreed to take the risk, and that there shall not be on the part of the mortgagor any right to demand or on the part of the mortgagee any liability to give an account of the profits, in case they exceed the interest. In clause 6 there is no such stipulation as regards the interest, but there is such a stipulation as regards fallen and dry wood, jungle, &c. In our opinion the provision in clause 6 that the interest and the profits will (or shall) be equal (*munafa sud har do barabar hoga*) is nothing more than an undertaking that they will be found to be equal. Other clauses are inserted which will apply if the profits and the interest are found to be equal; but the mortgagee is safeguarded by clause 11 in case the profits are found to be insufficient. In our opinion there must be an account taken from the date on which the mortgagee entered into possession.

"One other question remains for decision, namely whether compound interest is chargeable on the amounts by which the profits fell short of the interest in each year since the mortgagees took possession. It seems to us that there can be no reasonable doubt as to the intention of the parties to the mortgage. In clauses 3 and 4 the mortgagees promise to pay interest and compound interest at the rate of Rs. 14½ per cent. per annum. There is no indication of any intention that interest shall not be paid after the due date of the mortgage; on the contrary clause 7 shows that interest and compound interest are to be paid till realization of all sums due on the mortgage. In so far as the profits each year fell short of the interest, there was a default in payment of interest by the mortgagors; and it appears to us that although in clause 11 the expression 'compound interest' does not appear, it was the intention of the parties that interest not paid should be compounded with annual rests."

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On this appeal—

W. C. Bonnerjee, for the appellant, contended that clauses 6 and 11 of the mortgage deed were irreconcilable as being inconsistent with one another, and that clause 11 should therefore be rejected; and in that case by clause 6 the profits of the property must be taken as being equivalent to the amount due at the date of delivery of possession to the mortgagee, *i.e.*, the 16th July, 1893. It was also contended that under clause 11 compound interest was not chargeable on the amount by which the profits were less than the interest in each year since the mortgagees took possession; there was no intention of the parties that it should be paid, and compound interest was not mentioned in clause 11. The mortgagees moreover had never rendered any account.

DeGruyther, for the first and second respondents, who alone appeared, contended that clauses 6 and 11 of the mortgage deed were not necessarily inconsistent; but could be read together. The former clause should not be read as if it stood alone, but was subject to the qualification introduced by the latter clause. It was not intended, therefore, that the profits should be taken in lieu of interest. On the contrary, when they fell short of the interest due on the mortgage it was equivalent to a default being made in the payment of interest by the mortgagor, and there was the liability on them which existed in case of such default to pay compound interest. Reference was made to clause 7 of the mortgage deed as supporting this contention. The construction placed on the deed by both the Courts in India was correct, and should be upheld.

Bonnerjee replied—

1905, *November 28th*.—The judgment of their Lordships was delivered by LORD DAVEY.

IN this case there has been a good deal of litigation in the Courts below; but Mr. *Bonnerjee*, in opening the appeal, has very fairly narrowed the points which he thought he could properly bring to the attention of the Board.

The appellant is the representative of a mortgagor who executed a mortgage so far back as the 27th October, 1888, and the suit was brought to redeem a portion of the mortgaged property

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in which the appellant is interested. The provisions of the mortgage deed are somewhat peculiar. It is a compound of an ordinary mortgage and a usufructuary mortgage. The mortgage is for three years (clause 2); the interest is to be at the rate of 1 rupee 3 annas per cent. *per mensem* (clause 3), and clause 4 is as follows:—

“In the event of non-payment of interest yearly, the mortgagee will have power either to realize the principal with interest through a Court or get a new deed charging the property executed in lieu of interest. If, as a mark of favour, the mortgagor lets the interest remain unrealized, then in such case the interest shall be added to the principal from the date of its becoming due and interest at the said rate will run on it, as if its original formed part of the principal and within the term or after it till the date of realization, this rate of interest and compound interest shall continue.”

That provision very clearly makes the principal money payable with compound interest. Clause 6 then provides as follows:—

“After taking possession the mortgagee will be entitled to receive the net profits after paying the Government revenue and village expenses, &c., in lieu of interest, and during the time of her possession the interest and profits shall be deemed equal.”

If that clause stood alone it might possibly be construed as an ordinary usufructuary mortgage in which a mortgagee entering into possession accepts the profits in satisfaction of the interest. But that clause does not stand alone. There is a further clause (clause 11) which appears to their Lordships to qualify the *prima facie* meaning which might be attached to it. Clause 11 (so far as material for the present purpose) is to this effect:—

“If during the period of possession of the mortgagee, after depositing the Government revenue and defraying the village expenses, &c., the profits do not cover the amount of interest, we, the mortgagors, will make good the deficiency from our pockets in accordance with the accounts prepared by the agents of the mortgagee. If we cannot make good the deficiency we will pay it with interest at the rate mentioned above at the time of redemption.”

The first point taken is that that clause is inconsistent with clause 6. Their Lordships agree with the Court below in their inability to find anything inconsistent between the two clauses. Clause 11 no doubt qualifies what would be the *prima facie* meaning of clause 6; but they are perfectly capable of being read together.

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The second point is that the deficiency of the interest which the mortgagor undertook to pay by clause 11 does not carry compound interest. There again their Lordships agree with the Court of the Judicial Commissioner. Reading the whole deed together there can be no doubt that compound interest should be paid. In the first place this deficiency of interest is precisely such interest as is mentioned in clause 4, where it says:—"If, as a mark of favour, the mortgagor lets the interest remain unrealized." There is nothing in clause 11 to take away the express provision contained in clause 4 with regard to interest which remains unrealized, and the words "we will pay it with interest at the rate mentioned above at the time of redemption," must, in their Lordships' opinion, be taken to be only a concise way of bringing in the application of clause 6 to the interest which the profits are insufficient to pay. This is made clearer by clause 7, which provides that the villages are to be redeemed when "the whole of the principal, interest, compound interest and all dues against the tenants are paid in a lump sum."

Their Lordships see no reason, therefore, for differing from the conclusions at which the learned Judges in the Court of the Judicial Commissioner have arrived, or from the reasons which are expressed in their judgment. They will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of those respondents who appeared in the appeal.

Appeal dismissed.

Solicitors for the appellant:—*T. L. Wilson & Co.*

Solicitors for the respondents:—*Barrow, Rogers and Nevill.*

J. V. W.