

1913
August, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.
BALWANT SINGH AND ANOTHER (PLAINTIFFS) v. GAYAN SINGH AND
OTHERS (DEFENDANTS).*

Mortgage—Interest—Construction of document—Mortgage by conditional sale with no provision for post diem interest—Post diem interest not allowed.

A mortgage executed in 1869 provided for the payment of the sum of Rs. 300 with interest at Rs. 1-8 per cent. per mensem in one lump sum upon a certain specified date four years from the date of the mortgage. It further provided that, if the money was not paid upon that date, the property mortgaged should become the absolute property of the mortgagee. There was no stipulation of any kind as to the payment of interest after the date fixed.

Held that the mortgagee was not entitled to *post diem* interest. *Maihura Das v. Raja Narindar Bahadur* (1) distinguished. *Gudri Koer v. Bhubaneswari Coomar Singh* (2) and *Moti Singh v. Ramohari Singh* (3) followed.

THE facts of this case were as follows:—

Dharam Singh and Sundar Singh, the predecessors in title of defendants, executed a mortgage by conditional sale in favour of Towri Singh, the ancestor of the plaintiffs, on the 9th of March, 1869. The mortgage purported to have been executed to pay off a prior mortgage of the 14th of January, 1864, in favour of one Pem Singh. The defendants pleaded payment and absence of legal necessity to make the mortgage, but both the pleas were decided against them. The Subordinate Judge decreed the suit, giving six months' time to the defendants to redeem. Interest was to be calculated up to six months from the date of decree. The District Judge, however, modified the decree only allowing interest for four years from the date of the bond.

The terms of the bond were as below:—

"In order to pay off a previous mortgage deed I have borrowed Rs. 300 from the mortgagee and hypothecated the share of which I am the owner as security. I will repay and liquidate the loan with interest at 1-8 per mensem in one lump sum within four years. If I fail to do this, after the expiration of the appointed period, the hypothecated property may be foreclosed and sold outright."

The learned Judge held that the intention of the parties was that no interest was to be paid after four years from the date of the bond. The plaintiffs appealed to the High Court.

* Second Appeal No. 174 of 1913 from a decree of E. C. Allen, District Judge of Mainpuri, dated the 14th of August, 1912, modifying a decree of Pratap Singh, Additional Subordinate Judge of Mainpuri, dated the 20th of January, 1912.

(1) (1896) I. L. R., 19 All., 39. (2) (1891) I. L. R., 19 Calc., 19,

(3) (1897) I. L. R., 24 Calc., 699.

Babu *Sital Prasad Ghose*, for the appellant:—

The relation of mortgagor and mortgagee subsists so long as the mortgage is not foreclosed, and so long as that relation subsists interest is payable. The interest is a charge upon the property. In all cases of redemption interest runs up to the date of payment and in cases of foreclosure up to the date the property is foreclosed, *Mathura Das v. Raja Narindar Bahadur* (1), *Gudri Koer v. Bhubaneswari Coomar Singh* (2). The case of *Bikramjit Tewari v. Durga Dyal Tewari* (3) is against me, but that does not lay down the correct law. In fact a subsequent case, *Moti Singh v. Ramohari Singh* (4), does not follow that case. Even though the courts are not bound to allow the stipulated rate of interest, they have inherent power to allow interest under the Interest Act. In this case such a power should be exercised. Order XXXIV, rule 2, of the Code of Civil Procedure also contemplates that interest should be allowed up to the date of redemption.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble Mr. *Abdul Raoof*), for the respondents:—

The question is whether interest is payable on this mortgage. The question of intention is material. The intention was that the property was to be absolutely conveyed if principal and interest was not paid by the end of four years. This is no contract for payment of any interest after four years, at the end of which period the property was to become the property of the mortgagee and the debt wiped off. The contract of mortgage contemplated that the debt will be extinguished either by payment or by transfer of property in lieu thereof, at the end of the term. The payment of interest *post diem* was not contemplated. The mortgage in question is the creation of a contract and in the absence of a stipulation in the mortgage the interest *post diem* (even if it were payable by way of compensation or under the provisions of Act XXXII of 1839 (Interest Act), could not be made a charge upon the property. There is no statutory provision creating such a charge for any interest payable as compensation.

RICHARDS, C. J. and PIGGOTT, J:—This appeal arises out of a suit for foreclosure. The mortgage is a very old one, being dated the 9th of March, 1869. The mortgage provided for the payment

(1) (1896) I. L. R., 19 All., 39.

(3) (1898) I. L. R., 21 Cal., 274.

(2) (1891) I. L. R., 19 Cal., 19.

(4) (1897) I. L. R., 24 Cal., 699.

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of the sum of Rs. 300 with interest at 1-8 per cent. per mensem, in one lump sum upon a certain specified date, four years from the date of the mortgage. It then provided that if the money was not paid on that date the property should be the absolute property of the mortgagee. There was no stipulation of any kind for the payment of interest after the date fixed; and the mortgage, as mentioned above, was made before the passing of the Transfer of Property Act. Numerous defences were raised in the courts below.

The court of first instance gave a decree for foreclosure ascertaining the interest at the sum of Rs. 3,178-4-7 together with the Rs. 300 for principal, and provided that if payment was not made on the 20th day of July, 1912, the defendants should be absolutely debarred from all right to redeem the mortgaged property.

The lower appellate court modified the decree of the court below to this extent that it ascertained the amount due as being Rs. 300 principal together with interest at 1-8 per cent. per mensem for four years, that is to say, Rs. 300 for principal, and Rs. 216 for interest making a total of Rs. 516. Six months were allowed for payment, during which period of six months interest at the rate of 6 per cent. per annum should run.

The plaintiffs come here in second appeal contending that the decree of the court of first instance was correct and that the interest should have been allowed at the contractual rate during the whole period up to the time fixed for payment. In the course of the argument the learned vakil on behalf of the appellants contended that, even if he was not allowed the contractual rate of interest he should be allowed some rate of interest under the provisions of the Interest Act.

The main proposition of the appellants is that in all cases of mortgage by conditional sale, interest at the contractual rate runs up to the time fixed for payment and that this is the necessary consequence of the relationship of mortgagor and mortgagee whether the payment of interest is or is not provided for by the deed. The question is by no means free from difficulty. In the case of *Gudri Koer v. Bhubaneswari Coomar Singh* (1) it was held, under

(1) (1891) I. L. R., 19 Calc., 19.

circumstances which we cannot distinguish from the present, that *post diem* interest was not recoverable. This case was referred to and approved by the majority of the Court in the Full Bench ruling of *Moti Singh v. Ramohari Singh* (1). The question of *post diem* interest came before their Lordships of the Privy Council in the case of *Mathura Das v. Raja Narindar Bahadur* (2). In that case (which was one of a simple mortgage) this High Court had refused to allow *post diem* interest. This decision was overruled by their Lordships of the Privy Council : but a perusal of the judgement shows that their Lordships based their judgement on the particular terms of the mortgage deed and in particular upon a covenant in that deed which provided that the mortgagor would not transfer the mortgaged property until the full principal and interest had been paid. The stipulations in that deed upon which their Lordships relied are entirely absent from the mortgage in the present case. Under these circumstances, we see no sufficient reason to interfere with the decision of the court below.

With regard to the point that interest should be allowed under the Interest Act, it seems extremely doubtful, having regard to the time which has elapsed since the deed was entered into, whether any interest could be reasonable under that Act, but in any event we do not think that the sum which could be awarded under that Act would be a charge on the property. In the present case, the duty of the court is to ascertain what sum is now charged on the property for principal and interest.

Under these circumstances, we think that the decision of the court below was correct, and we accordingly dismiss the appeal with costs. The time for payment is enlarged so as to run for four months from the date of this decree. Simple interest at 6 per cent. per annum will continue to run as decreed by the court below. The decree will not issue until the appellant or respondent has made good the deficiency.

Appeal dismissed.

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

(2) (1895) I. L. R., 19 All., 39.