

1914
February, 20.

Before Sir Ecmg Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAJWANTA KUNWAR (PLAINTIFF) v. SHIAM NARAIN SINGH AND OTHERS
(DEPENDANTS)*

Civil Procedure Code (1908), section 34; order XXXIV, rules 2 and 4—Mortgage—Preliminary decree on mortgage—Interest—Discretion of Court.

Unless for some legal reason it sees fit to interfere with the contract as to the rate of interest, a court passing a preliminary decree in a mortgage suit under order XXXIV, rule 2, of the Code of Civil Procedure (1908), has no power to award interest at other than the contractual rate up to the date fixed for payment.

THIS was a suit for sale on a mortgage bond carrying interest at the rate of 2 per cent. per mensem with yearly rests. The defence, *inter alia*, was that the rate of interest was penal. The lower court held that the rate of interest, though high, was not penal, but allowed interest at the rate of 6 per cent. per annum only from the date of the institution of the suit to the date fixed for payment.

Maulvi Muhammad Ishaq, for the appellant, submitted that the mortgagee was entitled to interest at the contractual rate from the date of the institution of the suit up to date fixed for payment of the mortgage money and to a reasonable rate of interest from that date up to the date of realization. He relied on order XXXIV, rules 4 and 2, of the Code of Civil Procedure, 1908, and also on the following cases: *Rameswar Koer v. Mahomed Mehdi Hossein Khan* (1), *Maharaja of Bhartpur v. Rani Kanno Dei* (2) and *Bakar Sajjad v. Udit Narain Singh* (3).

The respondents were not represented.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit on foot of a mortgage, dated the 6th of July, 1904. The principal money secured by the mortgage was the sum of Rs. 250. The present claim is for Rs. 1,068-13-8. The court below granted a decree for sale and awarded the plaintiff interest at the rate of 6 per cent. per annum from the date of the institution of the suit to the date fixed for payment and awarded no interest after that date. The plaintiff has appealed on the question of the interest

* First Appeal No. 427 of 1912 from a decree of B. J. Dalal, District Judge of Azamgarh, dated the 4th of June, 1912

(1) (1893) I. L. R., 26 Calc., 39 (45). (2) (1900) I. L. R., 23 All., 131.

(3) (1899) I. L. R., 21 All., 361.

allowed. The other side does not appear. The rate of interest was high, and if we thought that the court below had any discretion in the matter, we doubt that we would have interfered with its exercise of it. It is contended, however, on behalf of the appellant, that the court below had no discretion in the matter. Order XXXIV, rule 4, provides that in a suit for sale if the plaintiff succeeds the court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 2. The material part of rule 2 is that the court should 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 on the day next thereafter mentioned; and (b) declaring the amount so due at the date of such decree. The date referred to in the rule is the date which the court fixes for the payment of the money by the defendant to the plaintiff. It seems to us that the clear meaning of the rule is that the court must ascertain the amount due on the mortgage up to the date mentioned. That amount must be according to the contract between the parties (unless the court for some legal reason sees fit to interfere with the contract as to the rate of interest). The only section of the Civil Procedure Code which gives any discretion in the matter of interest to the court is section 34. This section applies to decrees for the payment of money, and in our opinion does not in any way permit the court to reduce the interest below the contractual rate when it is taking the accounts and making the decrees provided for by order XXXIV. The result is that we allow the appeal to this extent that we vary the decree of the court below by awarding interest at the contract rate from the time of the institution of the suit to the time fixed for payment of the mortgage money. We extend the time to six months from this date. We allow no interest after that time, the matter being entirely in the discretion of the court. We make no order as to costs.

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Decree modified.