

1922

SRI GANGAJI
COTTON
MILLS COM-
PANY LD.
v.
EAST INDIAN
RAILWAY
COMPANY.

Allowing the appeal in part, I would substitute for the decree of the court below a decree for Rs. 7,398 and direct that the plaintiffs do pay the costs of the defendant company in both courts.

KANHAIYA LAL, J. :—I agree in the order proposed.

BY THE COURT.—The appeal is allowed. A decree for Rs. 7,398 will be prepared in favour of the plaintiff company. The plaintiff company will pay the costs of the East Indian Railway Company in both courts.

Appeal decreed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.
MAHADEO PRASAD AND OTHERS (DEPENDANTS) v. DHIRAJ SINGH (PLAINTIFF).*

1922

June, 21.

Mortgage by conditional sale—Interest—No specific provision for post diem interest—Right of mortgagee to claim interest post diem, at contractual rate.

A mortgage by conditional sale provided for the payment of the mortgage money on a certain specified date. It also provided for the rate of interest which the mortgage money was to bear. But there was no separate provision as to interest *post diem*.

Held, on suit for foreclosure brought some years after the expiry of the term of the mortgage, that the mortgagee was entitled to claim interest at the rate stipulated for in the bond up to the date of suit. *Mathura Das v. Raja Narindra Bahadur* (1), *Bindesri Naik v. Ganga Saran Sahu* (2) and *Sarala Dasi v. Jogendra Narayan Basu* (3) referred to.

THIS was a suit for foreclosure of a mortgage by conditional sale.

The main question in the suit was whether the plaintiff was entitled to get *post diem* interest, and, if so, whether at the rate stipulated for in the bond or any other. The court of first instance held that the plaintiff was entitled to interest up to the date of payment at the contractual rate, even though there was no express provision for this in the bond, and decreed accordingly.

The defendants appealed.

Dr. Surendra Nath Sen, for the appellants, contended that the plaintiff was not entitled to charge compound interest after the date fixed for payment. He further contended that if the plaintiff be held entitled to such interest by way of damages after the date fixed for payment of the mortgage, the claim would be barred by limitation. He commented upon

* First Appeal No. 165 of 1920, from a decree of Lakshmi Narain, Additional Subordinate Judge of Cawnpore, dated the 26th of February, 1920.

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

(2) (1897) I. L. R., 20 All., 171.

(3) (1897) I. L. R., 25 Calc., 246.

the case of *Mathura Das v. Raja Narindra Bahadur* (1). He referred also to the case of *Chajmal Das v. Brij Bhukan Lal* (2) which, he submitted, governed the case.

Munshi *Girdhari Lal Agarwala* (with Mr. B. E. O'Connor), for the respondent, cited the following cases in support of the judgment of the Subordinate Judge :—

Sarda Dasi v. Jogendra Narain (3) and *Bindesri v. Ganga Suran Sahu* (4); and contended that there were no words in the document which confined the running of interest to the period of five years.

Dr. *Surendra Nath Sen* was heard in reply.

MEARS, C. J., and PIGGOTT, J. :—The question which is in controversy between the parties in this appeal is whether in a mortgage by way of conditional sale the mortgagor is bound to pay interest at the agreed rate from and after the day upon which he should have discharged his obligations under the deed. In other words, is interest during the *post diem* period, though not expressly provided for, to be calculated under the particular provisions of the deed at the same rate as that stipulated for during the agreed period of the currency of the bond?

The position very shortly is as follows :—The borrower should have repaid, but did not repay, the principal and interest in December, 1907, and though certain payments of interest were made, the account at the commencement of this action on the 20th of October, 1919, showed that Rs. 8,000 principal and Rs. 10,581 interest were due. This was based upon the calculation that the express stipulation as to interest covered the whole period from the 8th of December, 1902, down to the date of the institution of the suit. Whilst it is of course proper that we should refer to and pay regard to decided cases, the main and important matters for our consideration are the exact terms of the document itself. When those have been considered, it is proper to see whether there are any decided cases so similar in their terms that the canons of construction that have been used by other courts will be of assistance to us. If so, it is our duty to avail ourselves of them.

The document, dated the 8th of December, 1902, was executed by *Mathura Prasad*, who was the father of the defendants (appellants). It stated that he had for a period of five

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

(2) (1895) I. L. R., 17 All., 511.

(3) (1897) I. L. R., 25 Calc., 246 (248).

(4) (1897) I. L. R., 20 All., 171 (180).

1922

MAHADEO
PRASAD
v.DHIRAJ
SINGH.

years mortgaged without possession a certain property in lieu of Rs. 8,000 to Raja Dhiraj Singh, that the money was to be applied in satisfaction of a decree, and then follow the words which have given rise to this question :—

It is covenanted that I shall continue to pay interest at the rate of 11 annas per cent. per mensem annually. In case of default in payment of interest, it shall be added to the principal, and I shall pay interest thereon as well at the aforesaid rate. I, or my heirs, or representatives, shall have no objection to it, nor shall I mortgage or sell the property to any other person until the payment of the mortgage money . . . In case of breach of promise and expiry of the stipulated period, the mortgagee shall become the absolute owner of the property mortgaged, and, I, or my heirs, or representatives, shall have no objection whatever . . . But if in any year I pay something towards principal in addition to the amount of interest, it will be not less than Rs. 500. I have, therefore, executed these few presents by way of a mortgage-deed by conditional sale, so that they may stand as authority and be of use when required.

The first point which stands out clearly is that for five years the rate of interest was defined with precision. Nowhere in the document is there any direct reference to what was to happen as regards interest if the mortgagor did not pay punctually or if in that event the mortgagee abstained from taking any proceedings for foreclosure. As regards default in payment of interest during the period between 1902 and 1907, he stipulates that he will not offer objection to interest being added to principal, and interest being paid on both, and in the same sentence he couples up a promise not to mortgage or sell the property to any other person until the payment of the mortgage money. A few lines above he had agreed to "continue" to pay interest at the rate of 11 annas per cent. per mensem annually.

It is difficult to believe that the parties could have had any other intention than that if the mortgagor failed to pay in December, 1907, the stipulations in the deed would remain in force and that the mortgagor would be bound to continue to pay interest at the agreed rate, calculated up to the time of tender or payment of principal and interest or the institution of a suit by the mortgagee. There is no suggestion that any lesser rate was agreed upon to come into force upon default. Nor is there any logical reason to think that the mortgagee would be willing for his money after 1907 to bear a smaller rate of interest. He could, on default, have commenced a suit, but he was not bound to do so. Dr. Sen, however, contends that on the 8th of December, 1907, the agreed interest at once stopped running and that there was, as between mortgagor and mortgagee, a definitely ascertainable debt, and that

from that date the lender acquired a new and different right, namely, the right to bring a suit for foreclosure. We do not agree with this interpretation of the document and we are of opinion that the mortgagee's rights as regards principal and interest, as apart from proceedings against the property, continued. The first case to which we may refer is that of *Mathura Das v. Raja Narindra Bahadur* (1). In that case the material words of the deed were that the amount of the loan in full, principal as well as interest, would be paid within a year. It is said in the deed :—

“ Until the payment in full of this amount, principal and interest, I shall not transfer either directly or indirectly the mortgaged property to anyone else; and if I do, such a transfer shall be deemed to be false and inadmissible.”

No payment was made, and some eight years after the deed the suit was commenced for the usual mortgage-deed. The Subordinate Judge passed a decree for the sum of Rs. 22,813. It was the amount of the principal alone with one year's interest; and, therefore, he disallowed the claim of the plaintiff to the remaining seven years' interest at the rate stipulated in the deed. The plaintiff came to the High Court and the decision of the Subordinate Judge was affirmed, and in that state of the case the plaintiff appealed to the Privy Council. Their Lordships held, without hesitation, that although there was no express term carrying on the obligation to pay interest at the agreed rate of 1-6 per cent. per mensem, that, nevertheless, there was an obligation upon the defendant to make that payment, and that on the ordinary construction of the words, they were in accordance with the usual intention of the parties to a simple mortgage. If, in the present case under consideration, on the ordinary construction of the words they are in accordance with the usual intention of the parties to a simple mortgage, as we believe them to be, we shall be coming to a right decision in holding that the defendants (appellants) must pay after the 8th of December, 1907, interest at the same rate as they had agreed to pay before that date. We are of opinion that this case of *Mathura Das v. Raja Narindra Bahadur* (1) is a very useful authority, which gives us clear and distinct guidance.

Now we come to the case of *Bindesri Naik v. Ganga Saran Sahu* (2), another Privy Council case, and again from

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

(2) (1897) I. L. R., 20 All., 171.

1922

MAHADEO
PRASAD
v.
DHIRAJ
SINGH.

a decision of this High Court. It possesses this additional advantage that the documents which came up for consideration were mortgages by way of conditional sale. When referring to the decision of this Court, their Lordships of the Privy Council said :—

“ Their Lordships do not think that, according to the tenor of the mortgage-deeds, it was intended that the capital sums should cease to bear interest, upon the arrival of the time stipulated for their payment.”

Then after stating that the Judges of this High Court had confined their attention to a single passage in the document, rather than taking into consideration the whole provisions of the deeds, their Lordships continued :—

“ In the present case, by the deed of the 21st of August, 1875, it is stipulated in general terms that interest at 18 per cent. per annum is to run upon the principal sums advanced, without any limitation as to the period of its currency. And it is also stipulated that in default of punctual payment at the end of each year, the creditors are to be at liberty to treat interest as principal and to recover it from the mortgaged property.”

Therefore, in that case there being no express provision as to what were to be the mutual rights and obligations after the date fixed for payment, the rate of interest was held to continue throughout the currency of the whole liability.

Finally, we may refer to the case of *Sardul Dasi v. Jogendra Narayan Basu* (1). In that case a mortgage-deed contained a covenant to pay principal and interest at a fixed rate in two years, and a further covenant not to transfer the mortgaged property until payment of principal and interest, and also on failure of payment of interest for one year to treat the amount after the lapse of that year as principal. The Calcutta High Court held, following the case of *Mathura Das*, that the obligation continued so long as the mortgage subsisted.

We are, therefore, of opinion that having regard to the terms of the whole document, its general tenor implies an obligation on the part of the borrower on the making of default to be liable for subsequent interest at the rate mentioned in the bond. There being no dispute as to the amount, we dismiss this appeal with costs.

Appeal dismissed.

(1) (1897) I. L. R., 25 Cal., 246.