

## APPELLATE CIVIL

Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

JAFAR HUSAIN (DEFENDANT) v. BISHAMBHAR NATH

(PLAINTIFF)\*

1937  
January, 21

*Civil Procedure Code, order XXXIV, rule 11(a)(i)—Mortgage suit—Interest—“On the principal amount found due”—“Principal amount” includes interest already accrued, according to the rate and the rests stipulated—Similar interest to continue up to the date fixed by the preliminary decree for payment.*

The words, “on the principal amount found or declared to be due”, in rule 11(a)(i) of order XXXIV of the Civil Procedure Code refer not only to the principal sum secured by the mortgage deed but also to the amount which had already become due on account of interest and compound interest and had become a part of the principal in accordance with the terms of the deed on the date on which the preliminary decree is prepared. The mortgagee is, therefore, entitled to interest at the rate, and with the rests, stipulated in the mortgage down to the date fixed by the preliminary decree for payment. The enactment of rule 11 of order XXXIV has not made any change in the law on this subject.

Messrs. *B. Malik and Jagdish Swarup*, for the appellant.

Mr. *G. S. Pathak*, for the respondent.

HARRIES and RACHHPAL SINGH, JJ.:—This is a defendant’s appeal arising out of final decree proceedings in a mortgage suit.

The plaintiff obtained a preliminary decree on the basis of a mortgage deed on the 15th of March, 1933, and in due course applied for the preparation of a final decree, when the defendant took certain objections. We are concerned with only one of them in this appeal. The defendant claimed that under the terms of the preliminary decree the plaintiff was not entitled to the total interest claimed by him. This objection was disallowed by the court below and it was ordered that a

\*First Appeal No. 550 of 1933, from a decree of Muhammad Akib Nomani, Civil Judge of Agra, dated the 15th of March, 1933.

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final decree be prepared. The defendant has now come up in appeal to this Court and the only point which we have to decide is whether the defendant is entitled to a reduction in the interest granted by the court below under the terms of the final decree.

In *Jagannath Prosad Singh Chowdhury v. Surajmal Jalal* (1) their Lordships of the Privy Council held that "On a preliminary decree for foreclosure or sale under order XXXIV, rules 2, 4 of the Code of Civil Procedure, 1908, a mortgagee is entitled to interest at the rate, and with the rests, stipulated in the mortgage down to the date fixed for redemption by the decree; and if the decree is varied on appeal, down to the date fixed for redemption by the appellate court." This decision was given in the month of October, 1926. Both parties to the appeal are agreed before us that before the enactment of the present rule 11 of order XXXIV the law was as stated in the above mentioned judgment of their Lordships of the Privy Council. The plaintiff contends that the law is still the same as it was when that case was decided by their Lordships of the Privy Council. The contention of the defendant is, however, different. In 1930 the present rule 11 of order XXXIV came into force for the first time and the contention raised by learned counsel for the defendant is that by the introduction of rule 11, order XXXIV, the legislature has changed the law on the subject. This is the only question for consideration in this appeal before us.

Before proceeding to discuss the point in issue we may be permitted to point out that Sir Dinshah Fardunji Mulla in his Code of Civil Procedure expressed the opinion that this new rule 11 of order XXXIV gives effect to judicial decisions under the Transfer of Property Act of 1882 and under order XXXIV of the Code. That is to say it places in the Civil Procedure Code a rule laying down how the interest is to be calculated. Rule 11, order XXXIV, enacts as follows [The rule was quoted.]

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The contention raised by learned counsel for the appellant is that the words, "on the principal amount found or declared due on the mortgage", in clause (a), sub-clause (i) have made a change in the method of calculating interest. Learned counsel contends that the legislature has enacted that in calculating the amount due to the mortgagee up to the date fixed for redemption, interest from the date of the decree till the date fixed for redemption should be calculated on the principal sum secured by the deed and not on the total amount due on the date of the decree on account of principal as well as compound interest. In other words, his argument is that the view expressed by their Lordships of the Privy Council in *Jagannath Prosad Singh Chowdhury v. Surajmal Jalal* (1) is no longer good law. As we have already pointed out, their Lordships have laid down in that case that a mortgagee was entitled to interest at the rate, and with the rests, stipulated in the mortgage down to the date fixed for redemption of the decree. According to the arguments of learned counsel for the appellant this view is no longer correct and that having regard to the provisions of rule 11 of order XXXIV of the Code of Civil Procedure, the court should not grant any interest to the mortgagee from the date of the decree till the date fixed for redemption on the sum which had already become due on account of compound interest. We are wholly unprepared to agree with this contention. In our opinion, the enactment of rule 11, order XXXIV, has not made any change whatsoever in the law on the subject and the view expressed by their Lordships of the Privy Council in the above mentioned ruling still holds good.

The mortgagee, in our opinion, is entitled to interest at the contract rate from the date of the suit till the date fixed for payment. If the mortgage deed provides that interest will be calculated six-monthly and that if it was not paid then it would become a part of the principal,

(1) (1926) I.L.R., 54 Cal., 161.

then that agreement will have to be enforced. Rule 11, order XXXIV, does not provide that at the time of calculating the amount due to the mortgagee, interest will be allowed only on the principal sum secured by the deed and not on the interest which, according to the agreement of the parties, had become part of the principal on the date on which the accounts are taken.

Learned counsel has, in support of his contention, relied on a ruling of the Oudh Chief Court, *Chhote Lal v. Mohammad Ahmad Ali Khan* (1). This case certainly supports the contention raised by learned counsel for the appellants. It was decided in that case that the words "principal amount found due or declared due on the mortgage" mean only the principal amount secured under the mortgage deed without interest till the date of the suit, and that therefore the mortgagee was entitled to interest from the date of suit to the date fixed for payment at the contract rate only on the principal sum secured by the mortgage deed and not on the total amount which at the date of suit consisted of the amount secured as well as the interest which had become part of the principal in accordance with the terms of the mortgage deed. With the utmost respect to the learned Judges who decided the case, we find ourselves unable to agree with this view taken by them. We may point out that in a later decision of the same Court, *Rajendra Bahadur Singh v. Raghubir Singh* (2) a different view was taken. It is only fair to add that the case of *Chhote Lal v. Mohammad Ahmad Ali Khan* (1) does not seem to have been cited before the learned Judges who decided the case of *Rajendra Bahadur Singh v. Raghubir Singh* (2). The learned Judges who decided the later case of 1934 held that "Where the mortgage deed provided that in case of non-payment of interest for any period of six months on the due date, the amount of interest shall be added to the principal money and interest and compound interest thereon shall run at the aforesaid rate till the

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(1) (1932) LL.R., 8 Luck., 315.

(2) A.I.R., 1934 Oudh, 473.

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date of payment, the court can allow interest on the aggregate amount found due instead of on the principal sum lent". We may also refer to a single Judge case of this Court, *Tara Chand v. Habat Shah* (1). In this case it was held by a learned Judge of this Court that in a suit for sale brought by a mortgagee on basis of a hypothecation bond, the rate of interest to be awarded is the contractual rate for the period down to the date fixed for payment under order XXXIV, rule 4 of the Code of Civil Procedure.

We are clearly of opinion that the view taken in *Ghote Lal v. Mohammad Ahmad Ali Khan* (2) is not correct. In our judgment the words, "on the principal amount found or declared due" in clause (a), sub-clause (i) refer not only to the principal sum secured by the mortgage deed but also to the amount due on account of interest which has become a part of principal in accordance with the terms of the deed on the date when the preliminary decree is prepared. In our judgment there is no force in the contention that the legislature when they used the words "due or declared to be due" in rule 11 enacted that in calculating interest from the date of the suit till the date fixed for redemption no interest on interest was to be allowed to the mortgagee in spite of the terms of the mortgage deed.

For the above reasons we hold that the view taken by the court below is correct and we accordingly dismiss the appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet

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LACHHMI NARAIN (DECREE-HOLDER) v. BATUK SINGH  
AND OTHERS (JUDGMENT-DEBTORS)\*

*Agra Tenancy Act (Local Act III of 1926), sections 23(1), 199, 203(1)—Agra Tenancy Act (Local Act II of 1901), section 20(3)—Permanent lease with powers to plant grove or construct buildings and make transfers—Whether thekadar or*

\*Appeal No. 88 of 1935, under section 10 of the Letters Patent.

(1) [1935] A.L.J., 1161.

(2) (1932) L.L.R., 8 Luck., 315.