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words used in the latter case, the circumstances here leave in their minds no doubt that the parties never intended that this undivided share of this sitting-room should really be sold. The so-called sale was a mere device to evade the Registration Act.

On this last issue accordingly the appeal, in their Lordships' judgment, succeeds, and they will humbly advise His Majesty that it be allowed, that the decree of the High Court be discharged and that of the District Judge restored. The appellant will have his costs of the appeal to the High Court and of this appeal.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondents Nos. 1 to 5: *Hy. S. L. Polak & Co.*

APPELLATE CIVIL

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

1933 *November,* 1

ABDUL RAHMAN AND OTHERS (DEFENDANTS) *v.* SHEO DAYAL (PLAINTIFF)*

Mortgage suit—Cause of action—Election—Mortgage fixing time for payment and also giving option to sue on default of payment of interest—Mortgagee exercising option and bringing suit—Whether suit maintainable without previous intimation of such election being given to mortgagor—Interest—Rate whether excessive and unconscionable.

Where a mortgage deed fixes a period for payment and also gives an option to the mortgagee to sue for the mortgage money on the occurrence of default in payment of two consecutive instalments of interest, the mortgagee may exercise his option on the occurrence of such default and bring the suit; and it is not a condition precedent to the maintainability of the suit that the mortgagee should have given previous notice or done some other act, prior to and independently of the act of suing, indicating to the mortgagor the exercise of the option.

Where the rate of interest in a mortgage deed was 12 per cent. per annum, compoundable every three months, it was *held* that the mere fact that there was a compound rate fixed would not

*First Appeal No. 497 of 1930, from a decree of Radha Kishan, First Subordinate Judge of Cawnpore, dated the 25th of June, 1930.

necessarily show that the interest was exorbitant or unreasonable; it was not shown whether the security offered was sufficient and ample, and it could not be said that the interest was extortionate or unreasonable.

Messrs. *P. L. Banerji, Majid Ali, S. K. Mukerji* and *Sri Narain Sahai,* for the appellants.

Dr. *K. N. Katju* and Mr. *S. N. Seth,* for the respondent.

SULAIMAN, C.J., and THOM, J.:—This is an appeal by the defendants mortgagors arising out of a suit for sale on the basis of a mortgage deed, dated 27th of August, 1924, executed by the father of the defendants in favour of the plaintiff and another person who is now dead. The mortgage deed was for Rs.25,000 and a period of five years was fixed for payment. It carried interest at 12 per cent. per annum, interest being payable every quarter. If there was a default in the payment of interest in any quarter that interest had to be added on to the principal and the consolidated amount had to bear interest. There was a further provision that "if default in payment of interest and compound interest be made for six months the mortgagees shall be at liberty to bring a mortgage suit and realise the entire amount due to them on account of the principal, interest and compound interest, costs in the suit and *pendente lite* and future interest, from the property mortgaged or from the person of the executants and the other properties, either in the case of default made in payment of interest for six months as aforesaid or after the expiry of the period mentioned in this document, i.e. 5 years; in short in the event of any of the two defaults being made in payment."

According to the plaintiff interest was paid regularly up to the 1st of March, 1927, but the first default for two consecutive quarters, that is, for an unbroken period of six months, occurred in September, 1927. This entitled the plaintiff to bring a suit for the recovery of the whole amount. He filed a suit within two years of that date.

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The main pleas in defence were that there had been no breach of the covenant and the plaintiff had no right to sue and that the rate of interest was excessive, exorbitant and unreasonable.

The court below has held that the suit was not premature and that the plaintiff is entitled to a decree. But it has reduced the rate of interest to one of 12 per cent. per annum, compounded every six months instead of quarterly. The defendants have accordingly appealed and the plaintiff has filed a cross-objection.

The same two points are urged in appeal before us. As regards the first point the contention is that in view of the pronouncements of their Lordships of the Privy Council in *Pancham* v. *Ansar Husain* (1) and *Lasa Din* v. *Gulab Kunwar* (2) the default in payment of interest for six months did not make the mortgage money become due and that, therefore, without doing some act showing that the mortgagee exercised his option and without communicating information of it to the mortgagors, the suit could not be filed.

So far as the terms of the mortgage deed are concerned there cannot be any manner of doubt that there was an express contract giving the right to the mortgagee to sue for the recovery of the entire amount due to him, principal, interest and costs, in the event of there being a default in the payment of two successive instalments of interest. The deed itself does not contain any stipulation that before the right to sue accrues there must be a notice or a demand or any other act indicating that the option was going to be exercised. Going, therefore, by the express contract entered into between the parties under this document the defendants would have no case and it cannot be seriously contended on their behalf that the suit is premature and is not maintainable without proof that previous to its institution the mortgagee had done some act showing the exercise of his option.

(1) (1926) I.L.R., 48 All., 457. (2) (1932) I.L.R., 7 Luck., 442.

But great reliance has been placed by the learned advocate for the appellants on the observations of Lord BLANESBURGH in *Pancham's* case (1), quoted above, at page 464. His Lordship observed: "Whatever else in relation to such provisos as the present may be open to debate, one thing is clear, viz., that such a default on the part of the mortgagors as was here relied on by the High Court gave to the mortgagees a right by appropriate action to make the mortgage money immediately due." It is contended that the appropriate action which would make the mortgage money immediately due must be some action prior to the suit, in the form of a notice of demand for the money. It may, however, be pointed out that his Lordship in that case held that the amendment of the plaint was in itself a sufficient action. In the later case of *Lasa Din* (2) their Lordships overruled the view taken by two Full Benches of this Court as to the point of time from which limitation under article 132 begins to run. The view which had prevailed in this Court previously was that if a mortgage deed provides a period for payment and further provides that the mortgagee would have a right to sue for the money earlier as soon as a particular default took place time begins to run from the date of such default or the expiry of the period, whichever is earlier. The view expressed seems to have been that the mere fact that the mortgagee does not exercise his option would not help to keep the period of limitation suspended. As soon as the default occurs the mortgagee is entitled to bring his suit to recover the amount and therefore the money becomes payable to him and has thus become due within the meaning of article 132. We are not aware of any case in which it was held by this Court that the mortgagor also can bring a suit to redeem the property by making a default in the payment of interest. A suit for redemption would be governed by a different article altogether, viz., article 148, and a mortgagor could

(1) (1926) I.L.R., 48 All., 457. (2) (1932) I.L.R., 7 Luck., 442.

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not be allowed to redeem the property contrary to the special contract. The word in section 60 of the Transfer of Property Act at that time was "payable" whereas now under the amendment of 1929 the word "due" has been substituted, which is the same as in article 132 of the Limitation Act.

Their Lordships of the Privy Council have now made it clear that under article 132 of the Indian Limitation Act money can become due only when the mortgagee can sue for his money and also the mortgagor can redeem the mortgaged property. Their Lordships have further thought that the necessary result of holding that the money has become due owing to default would be to give an option not only to the mortgagee to sue for money but also an option to the mortgagor to redeem, and that it would be an impossible result if the mortgagor can claim to redeem the property by having broken his own contract on refusing to pay the interest. Their Lordships have accordingly laid down that the money does not become due under article 132 for the purposes of limitation so long as the mortgagor also has not acquired the right to redeem the property, that is to say, there should be mutuality. If, therefore, the mortgagee alone is given an option either to wait for the full period or to sue immediately, the money has not really become due. Their Lordships, however, have indicated that the position might have been different if the words in the third column of article 132 had been "cause of action arises" in place of the words "becomes due". But their Lordships have not laid down that the mortgagee who has such an option is not entitled to maintain a suit unless and until before such suit he does some act indicating that he is going to exercise his option and informs the mortgagor of such an exercise. It has been merely laid down that the option to sue in case of default is for the benefit of the mortgagee exclusively, and if he does not choose to exercise it time does not begin to run against him.

The learned advocate for the appellants has placed strong reliance on a case decided by a single Judge of the Oudh Chief Court in *Raghbir Singh* v. *Rajendra Bahadur Singh* (1), where the learned Judge appears to have indicated that what is necessary is that the mortgagee must take some appropriate step to exercise the option reserved to him and suggested that this may be done by means of a notice. The point did not arise directly in that case, as a notice had in fact been given by the plaintiff before instituting the suit.

We are unable to hold that without previous notice or without the doing of some other act to the knowledge of the mortgagors a suit by the mortgagee is not maintainable when a default is made. Even under the old Full Bench rulings of this Court it was considered to be the duty of the mortgagee to sue if default occurred. Indeed, if he waited for more than 12 years it was thought that his claim would be barred by limitation. Under the authority of the rulings of their Lordships of the Privy Council he has the option of either suing or waiting. But there is no authority in support of the contention that he cannot sue unless and until he has first done some act indicating the exercise of the option independently of the act of suing.

We find that in cases where the legislature has thought it necessary that there should be some independent and antecedent act done by a person before suing, it has expressly provided therefor. We may, for instance, refer to section 111(*g*) of the Transfer of Property Act where forfeiture cannot take place unless in addition to the fulfilment of the conditions mentioned, the lessor gives notice in writing to the lessee of his intention to determine the lease. But where there is no such statutory enactment we cannot hold that a suit would be premature if no such notice has been given in advance.

(1) A.I.R., 1933 Oudh., 237.

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There are many cases in which there can be an option or election. One may cite the instances of voidable contracts or the right of reversioners to avoid voidable transfers made by Hindu widows or the right of creditors to appropriate payments made to any of several debts if not already earmarked by the debtor. In no such case has it ever been held that without first serving a notice on the defendant or doing some act and informing the defendant of it, a suit in the exercise of the option is not maintainable. Indeed, in all such cases the option is deemed to have been exercised when the suit is instituted. We may refer to the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1), where their Lordships of the Privy Council at page 333 observed: "Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir."

Similarly in *Cory Brothers* v. *Owners of Turkish Steamship "Mecca"* (2) Lord MACNAGHTEN observed as follows: "But it has long been held and it is now quite settled that the creditor has the right of election up to the very last moment, and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain."

We find no authority for the view that where there is no statutory enactment requiring any antecedent action or any previous notice as a condition precedent to the suit, the suit for sale brought on the basis of an express contract under which the option to sue is given is not maintainable.

(1) (1907) I.L.R., 34 Cal., 329.
(2) [1897] A.C., 286 (294).

We would further point out that even if there were such defect, that defect must now be deemed to have been cured because the period of five years fixed in the deed expired in 1929. The suit cannot therefore be thrown out on the simple ground that the suit should not have been brought without a previous notice.

As regards the second point, namely, whether the rate of interest is excessive and unconscionable, we find that the rate was 12 per cent. per annum and the accumulation of interest is due principally to the default in the payment of interest. The mere fact that there was a compound rate fixed would not necessarily show that it was excessive, exorbitant or unreasonable. In this particular case, the court below has no doubt considered that the quarterly rests were unreasonable, but apparently no materials were placed before the court to show that the security offered was Rs.25,000; the defendants have failed to show that the security offered was sufficient according to this standard. We are unable to hold that it was more than ample, which might indicate that the rate of interest was excessive. In the absence of any such proof we cannot accept the finding of the court below that the rate was extortionate or unreasonable and we accordingly allow the full contractual rate.

[The last point urged was one regarding the identity of the mortgaged property.]

The result, therefore, is that this appeal fails and must be dismissed with costs; the cross-objection of the plaintiff is allowed with costs and the rate at which interest should be calculated on the mortgage money should be one per cent. per mensem payable with quarterly rests and compoundable as provided in the deed.