

## APPELLATE CIVIL.

192.  
January,  
8.

Before Mr. Justice Wazir Hasan, Acting Chief Judge and  
Mr. Justice A. G. P. Pullan.

GAJRAJ SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) v.  
MAHRAJ MUNNU LAL (DEFENDANT-RESPONDENT).\*

*Interest—Mortgage partly usufructuary and partly simple—  
Term of mortgage fifty years—Interest at 12 per cent.  
simple, if to be regarded to operate as a clog—Deed of fur-  
ther charge—Interest at 24 per cent. per annum com-  
poundable with half-yearly rests, whether hard and un-  
conscionable.*

Where in a deed of mortgage the term fixed was fifty years and the mortgagee was to take the usufruct in part payment of the interest and the balance of the interest at the contractual rate of 12 per cent. was to accumulate, *held*, that as the mortgagor was a shrewd business man and had by the mortgage released his other property of a previous encumbrance so the provision of the rate of 12 per cent. per annum, simple interest, which was a very reasonable rate, could not be regarded to operate as a clog on the equity of redemption although the interest after accumulation for fifty years may amount to more than the market-value of the property.

But where in the deed of further charge the rate of interest was 24 per cent. per annum compoundable with six-monthly rests so that the interest on Rs. 98 the principal amount of the deed at the end of fifty years, the term annexed to that deed also, would amount to over 2 lacs, *held*, that the term as to the rate of interest having regard to the further term of fifty years was certainly hard and unconscionable and the mortgagee was in the circumstances entitled to interest only at 12 per cent. per annum compoundable yearly.

Messrs. *Rudha Krishna* and *B. K. Bhargawa*, for the appellants.

Messrs. *A. P. Sen* and *S. C. Das*, for the respondent.

HASAN; A.C.J. and PULLAN, J. :—This is a plaintiffs' appeal from the decree of the Additional Subordinate Judge of Sitapur, dated the 18th of November,

\*First Civil Appeal No. 58 of 1928, against the decree of Shyam Manohar Nath Shargha, Additional Subordinate Judge of Sitapur, dated the 18th of November, 1927.

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1927, arising out of a claim for redemption of a mortgage, dated the 17th of June, 1886, in respect of certain zamindari shares in two villages of Para and Baherwa in the district of Sitapur. The person who executed the mortgage just now mentioned was one Munnu Singh. Munnu Singh has since died and the first two plaintiffs Gajraj Singh and Suraj Bakhsh Singh are his sons and the third plaintiff Gaya Bakhsh Singh minor is his grandson, being the son of a deceased son of Munnu Singh called Harihar Bakhsh Singh. There are three more plaintiffs in the suit and they are the transferees from the first two plaintiffs having obtained a mortgage from them in respect of the property now in suit. The mortgage is partly usufructuary and partly simple. The sole defendant Mahraj Munnu Lal is the son of the original mortgagee Mahraj Debi Din. The money borrowed under the mortgage in suit was a sum of Rs. 5,500. The usufruct of the mortgaged property, when it came into the possession of the mortgagee, was to be appropriated towards the payment of part of the interest on the sum borrowed. Other part of the interest was to accrue and accumulate till it could be paid at the time of redemption. The term for which the mortgage was to subsist was fixed at fifty years certain.

On the 25th of May, 1893, Munnu Singh further borrowed a sum of Rs. 98 from the mortgagee Debi Din and agreed to give interest thereon at the rate of 2 per cent. per mensem compoundable with six-monthly rests. The repayment of the sum thus borrowed was again secured by hypothecating the same property which was mortgaged under the earlier deed of the 17th of June, 1886. It was further provided that all the terms of the mortgage of the last-mentioned date were to form part of the new transaction of loan evidenced by the deed of the 25th of May, 1893.

On the 25th of May, 1893, Munnu Singh further years had not expired, but in the course of the progress

of it in the court below the defendant agreed to allow redemption and the matter was not reopened before us. The suit has, therefore, been treated as a valid claim for redemption of the mortgage of the 17th of June, 1886, and also of the further mortgage of the 25th of May, 1893. It may be mentioned here that in the plaint the plaintiffs-appellants altogether ignored the existence of the mortgage of the 25th of May, 1893. The controversy in respect of their liability to discharge the debt due under that mortgage only arose when the defendant claimed that redemption could not be allowed without the plaintiffs satisfying the mortgage of the 25th of May, 1893. When the plaintiffs came to file their replication in answer to this claim of the defendant they denied the execution of the mortgage, its validity and binding effect. In this state of pleadings an issue was raised and tried as to the mortgage of the 25th of May, 1893. The trial court has found the execution proved.

Several issues were raised between the parties in the suit out of which this appeal has arisen but they have all been abandoned now, and the decision of the court below in respect of these issues has been accepted before us in the arguments both on the side of the appellants and of the respondent, except as to matters which we shall now state and on which we have to pronounce our judgment. On the side of the appellants the only argument addressed to us is that the rate of interest which has been allowed by the lower court in favour of the mortgagee in respect of the loan of Rs. 5,500 under the mortgage of the 17th of June, 1886, should not have been at the contractual rate of 12 *per cent.* per annum, but that it should have been reduced for either of the two reasons : (a) that the property mortgaged was joint Hindu family property and Munnu Singh as manager of the family exceeded his authority in agreeing to pay interest at that high rate; and (b) if the property mortgaged was not

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joint Hindu family property then the rate of interest acted as a clog on the exercise of the right of redemption in the circumstances of the case and therefore it should have been reduced. On the side of the respondent objection is taken to the reduction of the rate of interest as provided for by the deed of further charge, dated the 25th of May, 1893. The lower court has allowed interest to the defendant-respondent at the rate of 12 per cent. per annum compoundable annually. The perusal of the memorandum of appeal and of the petition of cross-objection will disclose that besides the points which we have stated in this paragraph there were several other objections raised against the decree of the lower court, but they were all expressly abandoned before us.

The first question for determination in the appeal, therefore, is as to whether the mortgaged property is the property belonging to the joint family or it is the self-acquired property of the mortgagor only. The learned Subordinate Judge has held that it is of the latter character and we agree with him. This property was acquired by Munnu Singh under a decree of court, dated the 9th of September, 1879 in a claim for pre-emption, (exhibits A5 and A6 the judgment and decree respectively). The decree was made subject to the payment of Rs. 3,787-7-3 till the 15th of November, 1879. The decree shows that the plaintiff Munnu Singh incurred an expenditure of Rs. 645-12-0 in prosecuting the suit for pre-emption. To this sum of money should be added the sum of Rs. 99 in lieu of which Munnu Singh purchased the right of pre-emption under the deed of the 30th of April, 1879 (exhibit A3). It is argued that for this sum of money he must have drawn on the family funds and if that is so it must be held that the family funds contributed to the acquisition of the property and that the property was, therefore, joint family property. But as the learned Subordinate Judge rightly points out the property in the

possession of the family did not yield more than Rs. 58-11-6 profits a year. The whole family lived on this amount of profits and there was no other source of income at the time. It is, therefore, highly improbable that the family funds contributed the sum of money which Munnu Singh had to spend in acquiring the pre-empted property. The evidence on the record unmistakably leads to the inference that Munnu Singh must have borrowed money to the extent of about Rs. 750. It appears that with a view to provide himself with funds for the purpose of satisfying the pre-emption decree Munnu Singh mortgaged the pre-empted property before possession was obtained on the 7th of November, 1879 (exhibit A14) and thereby obtained a loan of Rs. 5,000. We agree with the learned Subordinate Judge that this amount of Rs. 5,000 was borrowed for the purpose of paying the sum of Rs. 3,987-7-3 in court towards the pre-emption decree and the rest to re-pay the debt which Munnu Singh must have incurred for the purpose of buying the right of pre-emption and fighting the suit to enforce that right. The first line of argument therefore fails. We are of opinion that the second line of argument also fails. In support of the argument stress was laid on the provision contained in the mortgage of the 17th of June, 1886, to the effect that that portion of interest, which was not to come out of the usufruct was to accumulate for a period of fifty years and at the end of that period of time it would have swollen to a figure much larger (about Rs. 30,000) than the market-value of the property mortgaged. Having regard to all the other circumstances of the case we do not think that the said provision is a clog on the equity of redemption and the plaintiffs should be relieved of it. As the learned Subordinate Judge says Munnu Singh was a man possessed of shrewd business capacity. By executing the mortgage in suit he effected the release of half of the share in the village of Para and

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whole of the share in the village of Inayetpur from the earlier mortgage of the 7th of November, 1879, for his own benefit. We have already said that the condition of the term of fifty years has been withdrawn by the mortgagee. It is further to be noted that the rate of interest is only 12 *annas* per cent. per mensem simple. This in itself was not unreasonable at all. Further it appears from the evidence on the record that in lieu of that portion of interest which the mortgagee was to receive from the usufruct of the property at the contractual rate of 12 *annas* per cent. per mensem simple he could get, having regard to the usufruct of the mortgaged property in the year 1886, interest only at the rate of 6 *annas* 7 *pies* per cent. per mensem. The appeal, therefore, fails and is dismissed with costs.

We now come to the point raised by the respondent as to the reduction of the rate of interest in respect of the mortgagee's claim under the deed of further charge, dated the 25th of May, 1893. We already know that the term of fifty years was also annexed to the mortgage of the 25th of May, 1893. The sum borrowed under this mortgage was only Rs. 98 and the interest on this was charged at the rate of 24 per cent. annually with six-monthly rests. At the end of fifty years the mortgage-money would amount to over two lakhs of rupees. The term as to this rate of interest having regard to the further term of fifty years was certainly hard and unconscionable. We agree, therefore, with the learned Subordinate Judge that in the circumstances the mortgagee is only entitled to interest at the rate of 12 per cent. per annum annually compoundable as the reasonable rate of interest. The learned Subordinate Judge has awarded to the mortgagee money due on the deed of the 25th of May, 1893, at that rate of interest and we see no justification for interference with the decree of the learned Subordinate Judge. We accordingly dismiss the cross-

objection also with costs. A fresh decree under order XXXIV, rule 2 of the Code of Civil Procedure shall be prepared in this Court in terms of the decree of the lower court allowing a period of six months to the plaintiffs from the date of the decree of this Court.

*Appeal dismissed.*

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PRIVY COUNCIL.

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RAJA. PATESHWARI PARTAB NARAIN SINGH, SINEO DECEASED (PLAINTIFF) *v.* SITA RAM AND OTHERS (DEFENDANT) AND CONNECTED APPEALS.\*

[On Appeal from the Chief Court of Oudh.]

P. C. Appeals nos. 29, 30, 31 of 1928.

Oudh Appeals nos. 18, 19, and 20 of 1927.

*Pre-emption—Waiver of right of pre-emption—Offer to sell declined—Absence of notice of intended sale—“Village community”—Oudh Laws Act (XVIII of 1876) sections 7, 9 and 10.*

In 1872 the Government granted to a single grantee a large tract of waste land which was later constituted a separate village. On the grantee's death the village passed to his devisees who resided in England. Through their local agent they offered the village for sale divided into blocks at fixed prices. The appellant having purchased a block and registered the conveyance claimed to pre-empt under the Oudh Laws Act 1876 section 9, other blocks which had been purchased by the respondents severally under agreements completed at a later date. It appeared that the appellant knowing the fixed prices had definitely told the vendors' agent that he did not wish to buy any other block, and that he had acquiesced in an oral agreement already made for the sale of some of the blocks to one of the respondents.

*Held* that if the appellant had a right to pre-empt he had waived it by his conduct, even though no formal notice of an intention to sell was given under section 10 of the Act. *Bhagwat Singh v. Saiyad Nazir Husain* (1) followed in, *Bank of Upper India v. Munshi Alopi Prasad* (2) and *Hanuman Singh v. Adiya Prasad* (3) approved.

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\*Present: Lord BLANESBURGH, Lord TOMLIN, Lord THANKERTON, Sir GEORGE LOWNDES and Sir BRNO MITTER.

(1) (1902) 5 Oudh Cases, 395. (2) (1907) 10 Oudh Cases, 257.

(3) (1919) 22 Oudh Cases, 323.

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