APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Rachhpal Singh

JAIPAL SINGH AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* LACHMAN SINGH (PLAINTIFF-RESPONDENT)* 1934 *February*, 27

Hindu law—Joint family—Alienation—Co-parcener making alienation without legal necessity—Reversioners, whether can challenge alienation—Interest, high rate of—Legal necessity for rate of interest—Manager borrowing at high rate of interest—Court's power to reduce rate—Transfer of Property Act (IV of 1882), section 61—"Mortgagor" in section 61, whether includes his heirs and survivors—Mortgage by manager of joint Hindu family—Subsequent mortgage by son stipulating that second loan would be paid with first—Mortgages, if can be consolidated—Redemption—Equity of redemption can be lost only by agreement or foreclosure—Mutation in mortgagee's favour, effect of—Prior mortgagee purchasing rights of subsequent mortgagee—Prior mortgagee obtaining possession under prior mortgage—Redemption suit on prior mortgage—Mortgagee not having obtained possession under subsequent mortgage cannot retain possession on the basis of that deed—Court Fees Act (VII of 1870), Schedule I, article 1—Appeal in redemption suit—Cross-objection—Court fee leviable on cross-objections.

It is not only the co-parceners in a joint Hindu family who can challenge an alienation made by a member thereof; but, if the alienor dies, having made an alienation which is not really binding on the family, and then the surviving members die, the reversioners have a right to challenge the alienation. *Sarju Prasad Rao* v. *Mangal Singh* (1), relied on.

Where it is proved that it was not necessary for a manager or a member of a joint Hindu family to have contracted a loan at a high rate of interest, the court has the power to reduce the same and award interest at a reasonable rate. It is a difficult task to lay down hard and fast rules as to what is or what is not reasonable interest. The facts of each case are different and it may be that in one case the court may hold two per cent.

*Second Civil Appeal No. 158 of 1932, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Sitapur, dated the 30th of March, 1932, confirming the decree of Pandit Pearey Lal Bhargava, Munsif of Biswan, dated the 27th of October, 1931.

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per mensem to be quite reasonable while in another it may hold that interest should have been allowed at a higher rate.

The equity of redemption can only be lost either by a fresh agreement between the parties or by foreclosure proceedings and a mere stipulation in the deed, that if the mortgage money is not paid then the mortgage will be foreclosed, does not put an end to the mortgage. Where, therefore, the mortgagee fails to prove that there was any fresh agreement, subsequent to the date of the mortgage in which the mortgagor lost his equity of redemption nor were there any foreclosure proceedings, the entry recording mutation in the name of the mortgagee as owner is of very little help in the determination that the mortgage had been foreclosed.

The word mortgagor in section 61 of the Transfer of Property Act includes not only the mortgagor himself but also his heirs and survivors. The English doctrine of consolidation, namely, that that right can only arise when all the mortgages were originally made by the same mortgagor, cannot be applied to India. If therefore a father in a joint family executes a mortgage deed, and then after his death his son, the then manager of the joint family, executes another mortgage agreeing to repay the second loan along with the first then the two mortgages can be consolidated as the stipulation in the second deed for simultaneous redemption amounts to a contract for consolidation. *Chhota Lal Govindram* v. *Mathur Kevalram* (1), distinguished.

Once a prior mortgagee has obtained possession over the property mortgaged on foot of his prior mortgage, it cannot be said that he also acquires a right to hold possession under the terms of a subsequent mortgage if he happens to purchase the rights of a subsequent mortgagee. By purchasing those rights he acquires nothing better than the right to redeem so far as that subsequent mortgage is concerned. If he has any subsisting right under those subsequent mortgages, it is open to him to enforce the same, but as he never acquired possession under those deeds he cannot retain possession.

Cross-objection in appeals arising out of redemption suits must be stamped *ad valorem* on the amount by which the decretal amount is sought to be reduced. *Mansa Ram* v. *Umra* (2), relied on.

Messrs. *Ali Zaheer* and *B. K. Bhargava,* for the appellants.

Mr. *Ishri Prasad,* for the respondents.

(1) (1893) I.L.R., 18 Bom., 591. (2) (1911) 11 I.C., 198.

SRIVASTAVA and RACHHPAL SINGH, JJ.:—This is a defendant's second appeal arising out of a mortgage suit.

On the 6th of August, 1872, one Khanjan Singh executed a mortgage deed in favour of Maharaj Debi Din, mortgaging 5 biswas share in village Sheopuri for a sum of Rs.200 carrying interest at the rate of 2 per cent. per mensem to be compounded yearly. The mortgagor agreed to redeem the mortgage in 1282F. There was a further stipulation that if in any year interest due on the mortgage was not paid, then the mortgagee would be entitled to get possession over the mortgaged property and would take the profits in lieu of interest. Khanjan Singh had two sons, Gulab Singh and Beni Singh. The three constituted a joint Hindu family. Khanjan Singh died and his two sons succeeded to the joint family estate by right of survivorship. It appears that after the death of Khanjan Singh, the mortgagee instituted a suit to obtain mortgagee possession over the aforesaid share. That suit was decreed on the 24th of August, 1876, and since then the property in suit has been in his possession. After the death of Khanjan Singh his son, Gulab Singh, died and then his son Beni Singh. Debi Din had assigned his rights in the aforesaid mortgage deed to one Balwant Singh, father of Harihar Bakhsh Singh, defendant, about ten years after the creation of the aforesaid mortgage. Admittedly the plaintiff is the sole heir of Beni Singh. He instituted a suit in the court of first instance to redeem the mortgage in suit on payment of a sum of Rs.394-6-6 which was due on the mortgage at the time when the mortgagee obtained a decree for possession. Various pleas were taken in defence by the defendant. Harihar Bakhsh Singh died during the pendency of the present litigation, and the appellants before us are his sons. One of the pleas taken was that on the 26th of April, 1878, Gulab Singh, one of the two sons of Khanjan Singh, and the mother of Gulab Singh, executed a deed of further charge for

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a sum of Rs.200 agreeing to pay interest at the rate of 2 per cent. per mensem compoundable yearly. Another plea raised was that the mortgage of 1872 had been foreclosed. The courts below rejected the plea that there had been a foreclosure, and held that the plaintiff was entitled to redeem. They also found that Gulab Singh had executed a deed of further charge, and the plaintiff was bound to pay the principal and interest due on it before he could redeem the property in suit. The plaintiff was given a redemption decree on payment of a sum of Rs.3,186-6-6. Both the lower courts did not allow the defendant mortgagee interest at the contract rate which was 2 per cent. per mensem compoundable yearly, but awarded him simple interest at 2 per cent. per mensem. We may also point out that as regards the deed of further charge the plaintiff had taken a plea that it was not made for family necessity. The defendant contended in reply that it was not open to the plaintiff to take this plea. It is unnecessary to make any mention of the other pleas taken by the defendant in his defence in the courts below. The defendant has preferred a second appeal to this Court, while the plaintiff has filed cross-objections.

It appears that on the 26th of April, 1878, Gulab Singh, one of the two sons of Khanjan Singh, and his mother, executed a deed of further charge for a sum of Rs.200. The courts below held, accepting the plea of the defendant, that the plaintiff was bound to redeem this mortgage along with the mortgage deed of 1872. It was also found that this deed of further charge was made for family necessity by Gulab Singh, but it was found that it was not established that there was any necessity for Gulab Singh to have taken the loan at a high rate of interest under the terms of the deed; and as mentioned above the defendant mortgagee was allowed interest at the rate of 2 per cent. per mensem simple. The first point urged by the learned counsel for the appellant before us was that the plaintiff was

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not entitled to take the plea that the mortgage created by Gulab Singh was not for family necessity. It has been pointed out by us at the very beginning of our judgment that Khanjan Singh had two sons, Gulab Singh and Beni Singh, and they constituted a joint Hindu family, and that the property mortgaged was ancestral. The plaintiff admittedly is the heir of Beni Singh. It is conceded that Beni Singh was competent to challenge the binding nature of the deed executed by Gulab Singh in April, 1878 on the ground that it was not for family necessity or that there was no need to have borrowed the money at a high rate of interest. In our opinion there is no substance in the plea taken by the appellant to the effect that the plaintiff, who is the heir of Beni Singh, was not competent to raise the plea which was open to Beni Singh. In *Sarju Prasad Rao* v. *Mangal Singh* (1) it was decided that it was not only the co-parceners in a joint Hindu family who could challenge an alienation made by a member thereof; but, if the alienor died, having made an alienation which was not really binding on the family, and then the surviving members died, the reversioners had a right to challenge the alienation. We find ourselves in agreement with this view of law and hold that it is within the competence of the plaintiff to challenge the mortgage made by Gulab Singh. The learned counsel appearing for the appellant has not been able to show us any reason for taking a contrary view. It is not easy to understand why a reversioner in the position of the plaintiff should not be allowed to show that a mortgage deed executed by the previous owner of an estate was not for family necessity and was, therefore, not binding. It is just as much open to him to prove this as to the owner who made the actual transfer. Both the courts below have found that though the loan taken by Gulab Singh was for family necessity, yet it was not proved that there was any need for him to

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have borrowed the money at the rate mentioned in the deed. We find ourselves unable to take a different view. It is well settled that where it is proved that it was not necessary for a manager or a member of a joint Hindu family to have contracted a loan at a high rate of interest, the court has the power to reduce the same and award interest at a reasonable rate. The courts below, in the exercise of their discretion, have considered 2 per cent. per mensem simple to be quite reasonable, and we see no reason for interfering with this discretion. It is a difficult task to lay down hard and fast rules as to what is or what is not reasonable interest. The facts of each case are different and it may be that in one case the court may hold 2 per cent. per mensem to be quite reasonable while in another it may hold that interest should have been allowed at a higher rate. The learned counsel appearing for the appellant asked us to allow his client at least compound interest. We see, however, no reason for interfering with the decision of the court below on this point. We may note here that under other mortgage deeds between the same parties (exhibit A1 and exhibit A5), the rate of interest was 2 per cent. per mensem simple, and no reasons have been shown why in respect of the mortgage deed of 1872 higher rate of interest should have been stipulated.

The next contention urged on behalf of the appellant was that the mortgage of 1872 had been foreclosed. It appears that in addition to documentary evidence some witnesses were examined to prove that there had been an agreement between Beni Singh and Balwant Singh, assignee of the mortgagee, under which Beni Singh had lost his equity of redemption; but this evidence was disbelieved by both the courts. Before us reliance was placed by the learned counsel for the appellant on a document, exhibit A12, which is a copy of the khewat in which there is an entry of the 14th of March, 1893, which shows that mutation in respect

of the share in suit was made in favour of Balwant Singh, and the name of Beni Singh was removed from the revenue papers wherein he had been recorded as a mortgagor. It is urged that this entry in the revenue papers proves that the mortgage was foreclosed. In our opinion this argument cannot be accepted. The equity of redemption can only be lost either by a fresh agreement between the parties or by foreclosure proceedings. In the present case the appellant before us failed to prove that there was any fresh agreement, subsequent to the date of the mortgage in suit, in which Beni Singh lost his equity of redemption nor were there any foreclosure proceedings. The entry recording mutation in the name of the mortgagee as owner is of very little help in the determination of the point in issue. We do not know how this entry came to be made. It is not known who made the application asking that mutation as owner should be made in favour of Balwant Singh, and that the name of Beni Singh, mortgagor, should be struck off. It may be that the entry was the result of an *ex parte* order obtained by Balwant Singh without any knowledge on the part of Beni Singh. Evidence was produced to show that on the same date on which this entry was made, Beni Singh had appeared before the revenue court in connection with some other matter, and we are asked to draw a conclusion from that fact that the present entry must have been made with the consent of Beni Singh. We are unable to draw any such inference. A mere stipulation in the deed, that if the mortgage money is not paid then the mortgage will be foreclosed, does not put an end to the mortgage. For the reasons given above we are of opinion that the courts below were right in holding that the plaintiff was entitled to redeem the mortgage in suit.

Now we proceed to consider the pleas which have been urged by the plaintiff-respondent in his cross-objections. It may be stated that several pleas were

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taken but only two have been pressed before us. The first plea which has been urged is that the courts below were wrong in holding that the defendant-appellant was entitled to insist, that before redeeming the mortgage created in 1872 the plaintiff-respondent should pay the amount due on the deed of further charge of 1878. The learned counsel appearing for the plaintiff-respondent has contended before us, that as the two mortgages were made by two different persons, so they cannot be consolidated according to law. In other words, he contends that if a father in a joint family executes a mortgage deed, and then after his death his son, the then manager of the joint family, executes another mortgage agreeing to repay the second loan along with the first, then the two mortgages cannot be consolidated. We are clearly of opinion that this contention is unsound and cannot be accepted. Under the provisions of section 61 of the Transfer of Property Act, a mortgagor creating more than one mortgage is entitled to redeem them separately unless there is a contract to the contrary. Where, however, there is a stipulation in the second deed for simultaneous redemption, then it would amount to a contract for consolidation. The learned counsel for the respondent relied on *Chhota Lal Govindram* v. *Mathur Kevalram* (1) in support of his contention. It appears to us that this ruling has no application to the case before us. The facts of the above cited case were altogether different. There four persons who were members of a firm lent money to a mortgagor. Later on, one of the four mortgagees made a personal loan to the mortgagor. When redemption was sought then the four mortgagees insisted on consolidation. The learned Judges who decided the case held that as the later loan by the defendant no. 2 was a personal loan, the firm, as such, had no equity to insist on its being paid. The learned counsel also relied on the following observations which

(1) (1893) I.L.R., 18 Bom., 591.

appear in Coote's law on Mortgages, Volume II, page 891 (8th edition):

> "To apply the doctrine of consolidation the mortgages to be consolidated must have been made by the same person. The right can only arise when all the mortgages were originally made by the same mortgagor . . ."

We do not think that this view of the law can be applied to India. Here in section 61 of the Transfer of Property Act the word used is "mortgagor." What we have to see is whether the word refers only to the mortgagor himself or to his heirs and survivors as well. We have no doubt that the word includes not only the mortgagor himself but also his heirs and survivors. In order to clear this point we find that in the amended Transfer of Property Act it has been enacted in section 59A that "unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively." In England there is no such thing as a joint Hindu family where on the death of one member the remaining members succeed by right of survivorship. A manager of an estate owned by a joint Hindu family is competent to execute deeds on its behalf, so long as they are for the benefit of the joint family. In other words, he can bind the estate. In such transactions he does not enter into a transaction in his individual capacity but acts on behalf of himself and of other members of the joint family. According to the findings of the court below both the deeds of 1872 and of 1878 were executed by managers of the joint family. It so happened that when the first deed was executed, then Khanjan Singh was the manager, and when the second deed was executed, Gulab Singh was the manager. The mortgagor, practically speaking, was the same person in both the cases. For the reasons given above we are of opinion that the decision of the court below that redemption

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cannot take place without the plaintiff paying the amount due on the deed of further charge of 1878, is correct and must, therefore, be affirmed.

The next plea in cross-objections relates to the order passed by the learned Subordinate Judge to the effect that the defendant would be entitled to remain in possession under the mortgage deed, exhibit A2. It appears that in addition to the two mortgages referred to above, some other mortgages were made by Khanjan Singh and his son. They are exhibits A2, A4 and A5. The lower appellate court has passed an order to the effect that the redemption decree passed in this suit does not affect the rights of the defendant mortgagee to remain in possession of the property in suit under these mortgages, exhibits A2, A4 and A5, even after the mortgage in suit is redeemed, and that he is entitled to continue in possession of the entire mortgaged property in spite of the redemption. The plaintiff-respondent challenges the correctness of this order. In order to understand the position taken up by the plaintiff it is necessary to give a brief history of these mortgage deeds.

Exhibit A4.—This is a mortgage deed executed by Gulab Singh on the 22nd of January, 1885, under which he mortgaged 1 biswa 5 biswansis out of 5 biswas share which had already been mortgaged under the mortgage deed in suit. It contains a stipulation that in the event of non-payment of interest by a particular time, the mortgagee would be entitled to get possession.

Exhibit A5.—This is a mortgage deed also executed by Gulab Singh, dated the 14th of July, 1885, under which he mortgaged 1 biswa 5 biswansis share. This mortgage deed contains terms similar to those mentioned in Ex. A4.

Exhibit A2.—This is a mortgage deed executed by Khanjan Singh on the 13th of October, 1874, under which he mortgaged 5 biswas share to one Rustam Singh with possession. So far as the mortgages created

under exhibits A4 and A5 are concerned, no question of the mortgagee retaining possession can arise in view of the fact that the mortgagee never obtained possession under these two deeds. In our opinion the lower appellate court was not justified in passing an order that the right of the mortgagee to remain in possession under the terms of these two deeds, exhibits A4 and A5, will not be affected by the redemption decree in the case before us. The only question which we have to consider is whether the defendant can claim to retain possession even after redemption on the strength of the mortgage deed, exhibit A2, dated the 13th of October, 1874, executed by Khanjan Singh in favour of Rustam Singh. It appears that Rustam Singh had obtained possession under the terms of his mortgage deed. When in 1876 the mortgagee, under the mortgage deed of 1872, instituted a suit for possession, Rustam Singh was made a party as a subsequent mortgagee. The suit for possession as mortgagee was decreed not only against the heirs of Khanjan Singh but also against Rustam Singh. The defendant mortgagee before us obtained in 1887 an assignment in his favour of the mortgagee rights of Rustam Singh which he possessed under the mortgage deed of the 13th of October, 1874. In our opinion the defendant cannot be allowed to retain possession of the mortgaged property on the strength of the mortgage deed of Rustam Singh. Under the mortgage deed of 1872, Debi Din, the mortgagee, had a right to obtain possession and he exercised that right both against the mortgagor as well as the subsequent mortgagee who had, after the execution of the first mortgage, obtained possession. Rustam Singh had only a right to redeem the prior mortgage in favour of Debi Din. It so happens that now the rights of the prior and the subsequent mortgagee vest in one and the same person, therefore, the prior mortgagee, so far as the mortgage of Rustam Singh is concerned, stands exactly in the

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same position in which Rustam Singh would have stood if his rights under his mortgage had not been transferred. If Rustam Singh could not get possession, we fail to see how it is open to the defendant to do so. We do not agree with the view taken by the court below that the possession of the defendant over the property sought to be redeemed must also be deemed under exhibit A2 as well. The learned Subordinate Judge has not taken into consideration the fact that the defendant holds two distinct positions under two mortgage deeds. Under the mortgage deed of 1872, he is a prior mortgagee while under the deed of 1878, executed in favour of Rustam Singh, his assignor, he is a subsequent mortgagee. Once a prior mortgagee has obtained possession over the property mortgaged on foot of his prior mortgage, it cannot be said that he also acquires a right to hold possession under the terms of a subsequent mortgage if he happens to purchase the rights of a subsequent mortgagee. Under the subsequent mortgage deed, the only remedy which Rustam Singh had was to redeem and the defendant, by purchasing the right of Rustam Singh, acquired no better right so far as that subsequent mortgage is concerned. For these reasons we are of opinion that the lower appellate court was not justified in passing a conditional redemption decree. The plaintiff is entitled to redeem and take possession over the property in suit on payment of the amount mentioned above. If the defendant has any subsisting right under his mortgages, exhibits A2, A4 and A5, it is open to him to enforce the same against the plaintiff, but as he never acquired possession under these three deeds he cannot retain possession.

For the reasons given above we dismiss the appeal of the appellant with costs. The cross-objections filed by the plaintiff-respondent are allowed to this extent that the order of the lower appellate court to the effect, that the decree does not in any way affect the rights of

the defendant mortgagee under exhibits A2, A4 and A5 and he is entitled to continue in possession of the entire mortgaged property under exhibit A2, which has not yet been redeemed, is set aside. The plaintiff will be entitled to redeem and take possession over the mortgaged property in suit under the decree as framed by the court of first instance. So far as the cross-objections are concerned the parties will pay and receive costs according to success and failure. We extend the period within which the plaintiff should redeem the mortgage by six months from today. A usual redemption decree will be prepared by the office.

It was contended before us by the learned counsel appearing for the appellant that the cross-objections filed by the plaintiff-respondent were insufficiently stamped. In our opinion this contention is well founded. Cross-objection in appeals arising out of redemption suits must be stamped *ad valorem* on the amount by which the decretal amount is sought to be reduced. This is the view which was taken in *Mansa Ram v. Umra* (1). In our opinion the object of the cross-objections was to wipe off the claim of the defendant-respondent in respect of the deed of further charge and so court fee should have been paid *ad valorem* on that amount. We accordingly direct that the plaintiff-respondent will pay additional court fee of the value of Rs.261-4. The order allowing cross-objections in part is made subject to the payment of the additional court fee by the plaintiff-respondent within a period of one month.

Appeal dismissed.

(1) (1911) 11 I.C., 198.