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SURYA NARAIN SINGH v. JOGENDRA NARAIN ROY CHOWDHURY.

Appellant to have his costs of this appeal.

This judgment had been written before our attention was called by Baboo Taraknath Palit, the pleader for the appellant, to the decision of Macpherson and Banerjee, JJ., in Regular Appeals, 157, 158 of 1889 (1), in which the Court took the same view which we have here adopted.

Appeal allowed and decree modified.

A. F. M. A. R.

(1) *Before Mr. Justice Macpherson and Mr. Justice Banerjee.*

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MANGNIRAM MARWARI (PLAINTIFF) *v.* RAJPATI KOERI AND OTHERS (DEFENDANTS 1, 2, and 3).

Mr. *Evans* and Baboo *Dwarka Nath Chakrabutti* for appellants.

Dr. *Rash Behari Ghose* and Baboo *Jogesh Chunder Roy* for respondents.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.), in which the facts are sufficiently stated, was as follows:—

The plaintiff is the mortgagee of properties mortgaged by Jugal Persad Singh on the 23rd of January 1884 to secure a loan of Rs. 60,000, bearing interest at the rate of 10 per cent. per annum. The bond stipulates that the interest should be paid at the end of every period of six months; that on the expiry of every such period the unpaid interest should be added to the principal, and should carry interest at the rate of 1 per cent. per mensem; and that interest at the same rate should be charged on the unpaid interest of the interest, and similarly added to the principal.

On the 28th of January of the same year Jugal Persad gave a ticca lease of the mortgaged properties to Janki Singh for a term of seven years at an annual rent of Rs. 25,000. Out of this sum Janki Singh was to pay the interest on the loan, amounting to Rs. 6,000 a year, according to the terms of the bond.

On the same date Janki executed an *ikrarnama*, binding himself to the plaintiff to pay the interest and compound interest as conditioned in the bond, the terms of which were set out in the *ikrarnama*. This suit is brought against Mussumat Rajpati Koeri, the widow of Jugal Kishore, and against Janki and his sons, to recover the principal Rs. 60,000 and interest Rs. 29,187-9-0, according to the terms of the mortgage-bond, by the sale of the mortgaged properties. The plaintiff also asked for a decree that Jugal's estate was liable for the principal, and that his estate and Janki and his sons were jointly and severally liable for the interest.

The Subordinate Judge held that the principal and interest were charged on the mortgaged properties; that Jugal's estate was liable for the principal *plus* interest from date of suit to date of payment, which he allowed at

the rate of 6 per cent. per annum; and that Janki and his sons were liable for the interest, Rs. 29,187-9, plus interest from date of suit to date of payment, which he allowed at the rate of 3 per cent. per annum. He accordingly made a decree, which is very badly drawn, but which we understand to mean that, if the whole amount decreed is not paid within three months, the mortgaged properties are to be sold, and that Jugal's estate is to be liable for any portion of the principal, and Janki is to be liable for any portion of the interest which remains due after the sale of the mortgaged properties. But there is no direction as to how the balance is to be apportioned to principal and to interest.

Mussumat Rajpati Koeri and the plaintiff both appealed against this decree. For the former it is contended that the lease and *ikrarnama* created a new contract, which superseded the mortgage contract as to the payment of the interest, and that the effect of those instruments is to make the mortgagor simply a surety for the payment of the interest by Janki, and that the interest ceased to be a charge on the mortgaged properties. In support of this contention Dr. *Rash Behari Ghose* cited *Oakeley* v. *Pasheller* (1) and *Wilson* v. *Lloyd* (2). If the defendant is a surety, it is said that he is discharged under the provisions of section 139 of the Contract Act, as his remedy against the principal debtor, Janki, is impaired by the laches of the plaintiff, who took no timely measures to recover the interest, and consequently the defendant's right to sue Janki for the rent, which ought to have been paid to the plaintiff, is now barred. Under any circumstances, it is said, the plaintiff must proceed in the first instance against the principal debtor, as it is only on his default that the surety is liable.

A further contention is that a mortgagor is not bound by an agreement made at the time of the mortgage to pay compound interest or to pay interest on interest at a higher rate than is payable on the principal sum; that the conditions as to interest are in the nature of a penalty; and that, even if not so viewed, the Court on principles of equity should not enforce them.

As regards the first question, the cases cited by the learned pleader are not, we think, in point, the facts being wholly different. Here the three instruments really form one transaction. The *ikrarnama* and lease were executed within a few days of the mortgage-deed, they were all registered on the same date, and the arrangement, whatever it amounted to, was undoubtedly effected with the knowledge and consent of all the parties. Nothing has since occurred to alter the position of any of them, and we must look to the three deeds to see what that position was: It seems to us impossible to hold that the plaintiff abandoned his lien on the mortgaged properties for the interest of the mortgage money, or that the liability of the mortgagor for the whole mortgage-debt was in any way affected. The 3rd, 4th, and 5th clauses of the *ikrarnama* clearly indicate the intention that

(1) 4 Cl. & F., 207. (2) L. R., 16 Eq., 60.

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the liability to which he was made subject by the mortgage-deed should continue. The *ikrarnama* was in fact given as a collateral security; it added to, but did not derogate from, the powers which the mortgagee had under the mortgage-deed. Looking also at the nature of the transaction, it is in the highest degree improbable that the mortgagee would abandon the lien which the mortgage-deed gave him in respect of the interest, or that he would relieve the mortgagor from his liability as a principal. The circumstances which led to the lease being given are not disclosed in the evidence, but the object apparently was to secure the punctual payment of the interest, and so protect the property. The reason for the failure to pay it is a matter to be determined between Janki Singh and the heirs of Jugal Pershad. The Subordinate Judge rightly refused to enquire into this.

The contentions based on the supposition that the mortgagor was merely a surety in respect of the interest due under the mortgage-deed necessarily fail when it is found that he did not occupy that position. But we may say that there is nothing in the law which prevents a creditor from proceeding simultaneously against the principal and the surety, or which compels him to exhaust his remedy against the principal before suing the surety, and that the omission to sue the principal when the opportunity arises is not equivalent to giving him an extension of time.

As regards the interest which it was agreed to pay. It is clear that no sum was named as the amount to be paid in the event of the breach of the contract to pay, and the amount would vary according to the time for which payment was withheld. Section 74 of the Contract Act does not therefore apply to the case. Nor has any case for equitable relief been established. The parties were at arm's length, each knew perfectly well what he was doing, and the contract was deliberately made, with full knowledge of what would follow, and of what it was intended should follow, if the interest was not punctually paid. It is not shown that the mortgagor was in such dire necessity that he was compelled to accept these terms, or that any undue advantage was taken of his position. Moreover, the interest payable on the money advanced was certainly not excessive; it was probably lower than the rate usually charged, and if it had been paid, as it might and ought to have been paid, there would have been no ground for complaint.

There is no reason why the contract should not be enforced according to the intention of the parties.

Some cases have been cited to show that the Courts of Equity in England, in dealing with mortgage securities, would treat as invalid the conditions as to interest if made at the time of the original contract, on the ground that they were oppressive and tended to usury, or that they clogged the redemption. We think it unnecessary to refer to those cases

or to the principle on which they proceeded, as it has not been shown that that principle has been followed in any case in this country in which no special ground for relief has been established, and there is no law which makes the conditions invalid. It is questionable also whether the later decisions of the English Courts would support the contention (see *Clarkson* v. *Henderson* (1).

The appeal of the defendant Rajpati Koeri fails therefore on all points.

In the plaintiff's appeal only one point is raised, and that is that the Court should have allowed interest at the rate stipulated in the bond from the date of suit up to the time allowed for redemption, the interest which has been allowed from the date of suit 6 per cent. on the principal sum and 3 per cent. on the interest. The contention is we think valid, as section 86 of the Transfer of Property Act directs that the decree shall order an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage up to the day on which the mortgagor may redeem.

The provisions of sections 86-88 of the Transfer of Property Act did not apply to the case of *Mungniram v. Dhowtal Roy* (2) decided by the Full Bench of this Court.

The appellant only asks for such interest up to the date for redemption as fixed by the lower Court, viz., the 10th July 1889, and it will therefore be calculated up to that date, according to the terms of the bond.

It was argued for Janki Singh that the provisions of sections 86-88 of the Transfer of Property Act do not apply to him, as his liability did not arise under the mortgage-bond, and that the Court had therefore full discretion, under section 209 of the Civil Procedure Code, to fix the rate of interest from the date of the suit. But the fact that he, under another instrument, made himself liable for the interest does not prevent the operation of those sections. The interest is due on the mortgage according to the terms of the deed. The mortgagor continued liable jointly with him and he (Janki) undertook to pay the interest due on the mortgage.

The plaintiff by way of cross-appeal further objects to the decree, in so far as it exempts Jugal Pershad Singh's estate from liability for the interest which may remain due after the sale of the mortgaged properties. This objection should have been taken in his appeal against the decree, but we allowed him to raise it, and for the reasons which we have already given we think Jugal Pershad's estate is clearly liable.

There will be a decree to the following effect:—

The interest on the principal sum of Rs. 60,000, and on the interest Rs. 29,187-9 (*plus* the additional interest) will be calculated at the rates specified in the mortgage-bond from the date of the suit up to the 10th of July 1889. There will be a decree for the entire sum, viz. Rs. 60,000

(1) L. R., 14 Ch. D., 348. (2) I. L. R., 12 Calc., 569.

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principal, interest as above determined, and costs, for the satisfaction of which the mortgaged properties (except lot 21) or such portion of them as it may be necessary to sell be sold. The sale proceeds will be appropriated in the first instance in satisfaction of the principal sum of Rs. 60,000 and of the costs, and the surplus (if any) in satisfaction of the interest. For any portion of the principal Rs. 60,000 which remains due after the sale of the mortgaged properties, there will be a decree against Rajpati Koeri, as representative of her deceased husband Jugal Pershad Singh, to be satisfied out of any properties of the latter which have come into her possession. For any portion of the interest which may remain due after the sale of the mortgaged properties, there will be a joint decree against Rajpati Koeri, as representative of her deceased husband to be satisfied in the manner above stated, and against Janki Singh.

The plaintiff will get his costs in this Court and in the lower Court, and the appeal of the defendant Mussumat Rajpati Koeri is dismissed with costs.

Before Mr. Justice Norris and Mr. Justice Beverley.

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July 26.

GOPAL CHUNDER CHATTERJEE (DEFENDANT No. 2) *v.* GUNAMONI DASI (PLAINTIFF).*

Civil Procedure Code (Act XIV of 1882), s. 248—Notice of execution—Condition precedent—Execution of decree against legal representative.

The issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of a decree against the legal representative of a deceased judgment-debtor.

THE facts of this case were that Ghanoshyam Nusker, the husband of the plaintiff, held a tenure standing in the name of Muktaram Sen, and consisting of 8½ bighas of land, at a rental of Rs. 14 per annum, under defendant No. 1 (Bibi Jarao Koeri) and one Tarini Churn Bose deceased, each of whom was entitled to an eight annas share of the rent; that although no arrears of rent of the tenure were due, defendant No. 2, in collusion with defendants Nos. 10 and 11, who were the agents of defendant No. 1, induced defendant No. 1 to bring a suit for rent against

* Appeal from appellate decree, No. 1395 of 1891, against the decree of Baboo Hemango Chundra Bose, Subordinate Judge of Hooghly, dated the 29th of May 1891, affirming the decree of Baboo Bhubon Mohon Ghose, Munsif of Howrah, dated the 31st of March 1890.