APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

1892 *August* 20.

SURYA NARAIN SINGH (PLAINTIFF), *v.* JOGENDRA NARAIN ROY CHOWDHURY AND OTHERS (DEFENDANTS).*

Transfer of Property Act (Act IV of 1882), *s.* 86—*Interest—Interest at rate stated in bond—Discretion of the Court—Penalty—Civil Procedure Code (Act XIV of* 1882), *s.* 209.

The terms of section 86 of the Transfer of Property Act exclude the discretion conferred on the Court by section 209 of the Civil Procedure Code in cases coming under the Transfer of Property Act.

Mangniram Marwari v. *Dhowtal Roy* (1) distinguished. *Mangniram Marwari* v. *Rajpati Koeri* (2) approved.

Section 86 of the Transfer of Property Act binds the Court to give a decree at the rate of interest provided by the mortgage if it be a rate to which no valid legal objection can be taken; that interest must be so computed down to the day fixed by the Court, according to the terms of the 2nd paragraph of the section, that is the day being one within six months from declaring in Court the amount due. The amount to be declared due is the amount due for principal and interest on the mortgage, including interest at the rate provided by the mortgage-deed up to the day so fixed; it is the same whether it be ascertained on an account being taken by the order of the Court, or be ascertained by the Court itself.

Where a mortgage-deed stipulated for payment of half-yearly instalments of interest, and in case of default in such payments, provided for compound interest; *Held* that such a provision was not in the nature of a penalty; and there being no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person or any such consideration, the stipulation as to interest must be enforced.

Mangniram Marwari v. *Rajpati Koeri* (2) approved.

THIS suit was brought to recover the sum of Rs. 60,000 due as principal and Rs. 69,970-3 as interest on a mortgage-bond, dated the 19th Pous 1289, corresponding with the 2nd January 1883, praying for the sale of the mortgaged properties, and, in default of

* Appeal from Original Decree, No. 192 of 1891, against the decree of Babu Raj Chunder Sandel, Subordinate Judge of Murshidabad, dated the 30th of March 1891.

(1) I. L. R., 12 Calc., 659. (2) *Post* p. 366.

their proving insufficient, for a personal decree against the defendants Nos. 1, 2, and 3.

The bond declared that the principal sum should fall due on the 9th Jaistha 1295, corresponding with the 21st May 1888, and contained a covenant relating to interest, and, in default, of compound interest, which ran as follows:—

"And that we shall pay off the amount of interest that may be due from the date hereof to the 8th Jaistha 1290 on the day following, that is on the 9th Jaistha, and that we shall thereafter continue to pay interest in two instalments every year, that is, the first instalment of interest on the 9th Argrahayan, and the 2nd instalment on the 9th Jaistha, and that, for the purpose of calculation of interest, a month shall be considered equal to 30 days and a year to 360 days, and that if interest be not paid in accordance with the aforesaid covenants, then at the expiration of the date of payment the interest shall be considered as principal money, and we shall pay interest thereon at the rate aforesaid, that is, we shall pay compound interest. If interest be not paid in accordance with the covenants, then you will be at liberty to realize the amount of interest due by bringing a suit therefor in Court without waiting till the end of the period mentioned in this bond for the payment of the principal money, but you will not be bound to realize the amount by the institution of a suit, you will have the option of waiting till the period fixed for payment, and we do further promise that, even after the expiration of the period mentioned in the bond, we shall pay interest at the rate of 1 per cent. as aforesaid, and on no account shall the rate of interest be reduced by the Court."

The defendants Nos. 1 and 2 admitted the bond, but contended that as the stipulation regarding the payment of compound interest was in the nature of a penalty, it should not be allowed, and that as on the day of the execution of the deed the plaintiff improperly received the sum of Rs. 1,400 from them, it should be deducted from the mortgage-debt.

The defendant No. 3 did not file any written statement, and the defendants Nos. 4 to 7, the second mortgagees, did not appear.

The Subordinate Judge found that the defendants Nos. 1 and 2, and the husband of the defendant No. 3 had executed the mortgage-deed under a legal necessity, and that they had of their own accord paid Rs. 1,400 to the plaintiff. He gave a decree for the sum of Rs. 1,29,970-3, with interest on the principal sum of Rs. 60,000 at the mortgage rate of 1 per cent. per mensem during the pendency of the suit up to the date of the decree, and

1892

SURYA NARAIN SINGH v. JOGENDRA NARAIN ROY CHOWDHURY.

allowed interest at the rate of 6 per cent. from the date of the decree until realization within six months on the aggregate sum of Rs. 1,42,223-0-9.

The plaintiff appealed to the High Court, and the defendants, Nos. 1 and 2, filed cross objections.

Baboo *Tarakuath Palit* for the appellant.

Dr. *Rashbehari Ghose* for the respondents.

The arguments sufficiently appear from the judgment of the Court (PIGOT and RAMPINI, JJ.), which was as follows :—

This is a suit upon a mortgage. The appellant is the mortgagee who, in the lower Court, obtained a decree. The chief question in the appeal before us is as to the amount awarded by the decree in respect of interest on the mortgage-debt. The mortgage-deed is dated the 19th Pous 1289 ; the amount of the mortgage loan is Rs. 60,000 ; the date fixed for the repayment of the mortgage money is the 9th Jaistha 1295, and the rate of interest stipulated for is 1 per cent. per mensem, with a provision for compound interest in case of default in the payment of interest, as provided by the deed.

The provision relating to the payment of the interest, or, in default, of compound interest, is as follows :—(After reading the portion of the bond set out, *ante* p. 361, their Lordships continued) :—The amount claimed by the plaintiff as due at the date of the institution of the suit for principal and interest, after allowing for certain payments made, was Rs. 1,29,973-3, and for this sum the plaintiff had a decree from the lower Court. But the decree allowed to the plaintiff interest on the principal debt only at the rate of 1 per cent. per mensem (the mortgage rate) during the pendency of the suit, that is from December 11th, 1889, to April 4th, 1891, the date on which the decree was made; and allowed only the Court rate of interest, that is 6 per cent., from the date of the decree until realization within six months from the decree upon the aggregate sum Rs. 1,42,223-0-9 (including interest and costs) decreed.

The appellant contends that he is entitled to interest at the mortgage rate on the whole amount due on the mortgage

from the institution of the suit until the expiration of the period, six months, fixed for payment under the decree, and thereafter at the Court rate until payment. The respondents who have filed cross objections, contend that compound interest should not be allowed; that, though by the terms of the deed, compound interest is stipulated for, the Court will relieve against compound interest when the agreement for it is made at the time of the mortgage, although not if made by special agreement at the time when interest has become due. It is further contended that the appellant ought not to succeed, as the Court, in making the provision for interest contained in the decree, acted in the exercise of the discretion under section 209 of the Civil Procedure Code, which is possessed under that section in suits on mortgages as well as in other suits (see the Full Bench case of *Mangniram Marwari* v. *Dhowtal Roy* (1), and that this Court will not interfere where the discretion vested in the original Court has been duly and judicially exercised.

For the appellants on this latter point it was contended that the suit in the Full Bench case was not brought under the provisions of the Transfer of Property Act; that the present suit is governed by the provisions of that Act; and that by section 86 of that Act the Court is bound to allow interest at the mortgage rate down to the date to be fixed by the Court under that section for the payment of the money due under the mortgage.

We shall deal with this latter contention first. We think it ought to prevail. In the Full Bench case cited the suit was brought in accordance with the old procedure, before the Transfer of Property Act was passed, and the parties were still content with the case being dealt with on that footing. But it seems to have been the opinion of the Chief Justice that, had the Transfer of Property Act applied, the rate of interest would not have been within the discretion of the Court.

We think that section 86 binds the Court to give a decree at the rate of interest provided by the mortgage, if it be a rate to which no valid legal objection can be taken; that interest must be so computed down to the day fixed by the Court, according

(1) I. L. R., 12 Calc., 659.

1892

SURYA NARAIN SINGH v. JOGENDRA NARAIN ROY CHOWDHURY.

to the terms of the 2nd paragraph of the section, that is the day being one within six months from declaring in Court the amount due. The amount to be declared due is the amount due for principal and interest on the mortgage, including interest at the rate provided by the mortgage-deed up to the day so fixed; it is the same, whether it be ascertained on an account being taken by the order of the Court, or be ascertained by the Court itself; we say this with reference to the concluding words of the first paragraph "or declaring the amount so due at the date of such decree," the amount so due is the amount which will be due "on the day next hereinafter referred," that is the day to be fixed within the six months, as provided in the next paragraph, and that amount may be declared at the date of the decree, if the Court does not think it necessary to order an account.

We think the terms of this section exclude the discretion conferred on the Court by section 209, Civil Procedure Code, in cases coming under the Transfer of Property Act.

Upon the question raised by the respondent, whether compound interest should be allowed, we see no reason to entertain any doubt.

The mortgage was entered into with every circumstance of deliberation that can be required to give the provisions of the instrument their full effect, as embodying an agreement perfectly understood, and freely entered into. Such a contract as to interest as the present must, we think, be held valid, where there is no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person, or the like considerations, but there is nothing of the sort in the case. *Mainland* v. *Upjohn* (1) was referred to for the respondents on this question; certain observations in the judgment were cited, in which the rules prevailing before the abolition of the usury loans were referred to. But the case itself appears to us to be an authority for the appellant, so far as it is applicable, inasmuch as it affirmed the propriety in a redemption action of the deduction of certain sums deducted by the mortgagee at the time of making the advances, they being made as part of the mortgage contract in

(1) L. R., 41 Ch. D., 126.

pursuance of a deliberate bargain, and without any improper pressure, and the parties being completely on equal terms.

We think this contention must fail, and that the lower Court was right in holding that compound interest ought to be allowed. As to the construction of the provisions in the mortgage-deed relating to the date from which interest shall be added to principal in case of default, that is that compound interest shall be payable, we think that the deed provides that this provision shall take effect in default of payment of the six monthly instalments, and from the date of such default, and that this provision is not in the nature of a penalty.

We do not think that any inference can be drawn to negative the intention that compound interest shall become payable in case of default from the provision later in the deed, that payments shall in the first instance be appropriated to the payments of interest, and as to any surplus, in satisfaction of principal. That provision is no doubt properly appropriate to an instrument providing for simple interest; but we do not think any inference which could be drawn from that circumstance could be held to be capable of controlling the perfectly explicit agreement as to compound interest, contained in the earlier part of the deed.

As to the claim made by the respondents for a deduction of Rs. 1,400 with interest from the amount of the debt, this was referred to before us, but nothing was, or, indeed, could be, said to support the contention that the lower Court was wrong in its conclusion as to this matter. The agreement as to this sum was deliberately made and acted on by the respondents, and cannot, in the complete absence of anything to show pressure or unfair dealing, be now challenged by them.

We allow the appeal and modify the decree, by directing that the account be taken of what will be due to the plaintiff for principal and interest on the mortgage at compound interest as therein provided, and for his costs of suit six months from the date of the decree of this Court, and that interest shall run upon the amount so found due at 6 per cent. from that date until realization.

If the parties desire to speak the minutes of the decree before it is signed, we shall hear them.

1892

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.*

1890 *August* 22.

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