

## ORIGINAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

1933  
February, 2

RAGHUBIR SINGH, RAJA, AND ANOTHER (PLAINTIFFS) v.  
KUNWAR RAJENDRA BAHADUR SINGH (DEFENDANT)\*

*Transfer of Property Act (IV of 1882), section 67—Mortgage—Mortgage deed fixing 6 years for payment but giving mortgagee option to recover his money before the stipulated period on mortgagor's failing to pay two six-monthly instalments of interest—Failure of mortgagee to pay two six-monthly instalments of interest—Mortgagee exercising the option to recover before the period fixed by giving notice—Suit after expiry of notice, if premature—Mortgage money, when becomes due under section 67 of the Transfer of Property Act.*

Section 67 or for the matter of that any other section of the Transfer of Property Act does not lay down any provision as regards the time when the mortgage money is to become due.

It is to be determined in each case upon the terms of the contract between the parties. Ordinarily when a mortgage deed fixes a period for payment, the mortgage money becomes due at the expiration of the stipulated period. But if the mortgage deed also gives the mortgagee an option to recover his money before the stipulated period the mortgage money in such a case becomes due as soon as the mortgagee has exercised the option given to him.

Where, therefore, the period fixed for payment in a mortgage deed is 6 years and it is further provided that "if after execution of the deed the mortgagees find that any person has any share, interest or title in the mortgaged property or that it is subject to any gift, *waqf* or encumbrance or if the interest or compound interest for any two six-months be not paid in full or if any dispute arises with regard to the mortgaged property, then in each of the aforesaid cases the mortgagees will have the option, before expiration of the period fixed, to recover the principal together with interest, compound interest and costs, in other words the whole of the amount due through court . . ." and the mortgagor fails to pay in full two instalments of interest and the mortgagee sends a notice to the mortgagor demanding payment of the mortgage money and after the expiration of the period fixed for payment in the notice institutes a suit for the recovery of his mortgage money the suit is not premature though it is filed before the period

\*Original Suit No. 1 of 1932.

fixed for payment in the mortgage deed, as the mortgage money becomes due as soon as the option is exercised. *Lasa Din v. Gulab Kunwar* (1), relied on. *Mohammad Sher Khan v. Raja Seth Swami Dayal* (2), distinguished. *Yeo Htean Sew v. Abu Zaffar Koreshi* (3), and *Pancham v. Ansar Husain* (4), referred to.

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Messrs. *Makund Bihari Lal and Ram Gopal*, for the plaintiffs.

Messrs. *A. P. Sen and Radha Krishna*, for the defendant.

SRIVASTAVA, J. :—This is a suit brought by the plaintiffs to recover Rs.8,17,794-9-11 on the basis of a mortgage deed, dated the 17th of October, 1929, by sale of the mortgaged property.

The mortgage deed in suit was executed by the defendant in favour of the plaintiff No. 1 and his father Raja Sir Harnam Singh Ahluwalia for a sum of Rs.7,60,108-11-9 carrying interest at 7 per cent. per annum with half-yearly rests.

Raja Sir Harnam Singh died on the 20th of May, 1930, leaving a will and appointing two of his sons, plaintiffs 1 and 2 as executors of his will. The will was admitted to probate in the High Court of Judicature at Lahore. The plaintiffs instituted the suit in their right as executors. The plaintiff No. 1 also claimed to be entitled to sue in his right as a mortgagee under the terms of the mortgage deed.

The defendant admitted the execution of the mortgage deed in suit but denied the right of the plaintiffs to maintain the suit and alleged that all the heirs and beneficiaries under the will of the late Raja Sir Harnam Singh were necessary parties to the suit. He also pleaded that the suit was premature. He further alleged that six of the villages included in the mortgage deed which he had inherited from his mother had been entered in the deed without his free consent by reason of undue influence exercised on him by the mortgagees.

(1) (1932) I. L. R., 7 Luck., 442. (2) (1921) L. R., 49 I. A., 60.  
(3) (1900) I. L. R., 27 Cal., 938. (4) (1926) L. R., 53 I. A., 187.

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On the pleadings of the parties set forth above, Mr. Justice KISCH who was seized of the case before it was transferred to my file framed the following issues :

(1) Is the suit premature as alleged in paras. 8 to 11 of the written statement?

(2) Was the inclusion of the six villages mentioned at the foot of the written statement in the mortgage deed in suit caused by undue influence exercised by the mortgagees? If so, what is the effect?

(3) Are the other heirs of the late Sir Harnam Singh Ahluwalia necessary parties to the suit?

(4) To what reliefs are the plaintiffs entitled?

Neither of the parties has produced any oral evidence.

*Issue No. 2*—Mr. A. P. Sen, the learned counsel for the defendant, did not press the plea of undue influence embodied in this issue. No evidence has been given by the defendant in proof of it. I therefore decide the issue against the defendant.

*Issue No. 3*—This issue also was not pressed by the defendant. Exhibit 2 is a copy of the probate granted by the Lahore High Court to the plaintiffs as executors of the last will of Raja Sir Harnam Singh Ahluwalia. Paragraph 15 of the mortgage deed also allows the mortgagees jointly or severally as well as the survivor of them to institute a suit on the basis of the mortgage. I accordingly decide this issue also against the defendant.

*Issue No. 1*—The only question which now remains to be determined is whether the suit is premature. The mortgage deed, as stated above, is dated the 17th of October, 1929. The period fixed for payment is six years. Clause 8 of the deed is in these terms :

“ . . . If after execution of this deed the mortgagees find that any person has any share, interest or title in the mortgaged property or that it is subject to any gift, *wagf* or encumbrance or if the interest or compound interest for any two six-months be not paid in full or if any dispute arises with regard to the

mortgaged property, then in each of the aforesaid cases the mortgagees will have the option, before expiration of the period fixed, to recover the principal together with interest, compound interest and costs, in other words the whole of the amount due through court . . .”

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Clause 16 provides :

“All the conditions of this deed will be binding on the executant, his heirs and successors and in case of breach of any term or condition of this mortgage deed, the mortgagees their heirs and successors will have the right without waiting for expiration of the period fixed, to recover the whole amount due either privately or through court, from the mortgaged property as well as from the mortgagor’s interest in other properties, moveable as well as immoveable.”

Srivastava, J.

It is admitted that the defendant failed to pay in full two instalments of interest. It is also admitted that on the 29th of February, 1932, the plaintiffs sent a notice to the defendant demanding payment of the mortgage money within a month. The present suit was instituted two days after the expiration of the period fixed for payment in the notice just mentioned.

It is urged on behalf of the defendant that the due date for payment under the deed is the 17th of October, 1935, and as the suit has been brought before that date, it is premature. As regards the option allowed to the mortgagee in clauses 8 and 16 of the mortgage deed, it is contended that they are not enforceable against the statutory provisions contained in section 67 of the Transfer of Property Act. The argument is that section 67 of the Transfer of Property Act gives the mortgagee a right to sue for sale after the mortgage money has become due to him and that it is not possible to say that the mortgage money has become due to the mortgagee before the expiration of the period of six years fixed in the deed. I find myself unable to accede to this argument. Section 67 or for the

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matter of that any other section of the Transfer of Property Act does not lay down any provision as regards the time when the mortgage money is to become due. It is to be determined in each case upon the terms of the contract between the parties. Ordinarily when a mortgage deed fixes a period for payment, the mortgage money becomes due at the expiration of the stipulated period. But if the mortgage deed also gives the mortgagee an option to recover his money before the stipulated period, I fail to see why the mortgage money in such a case should not be held to have become due as soon as the mortgagee has exercised the option given to him. In *Lasa Din v. Gulab Kunwar* (1) their Lordships of the Judicial Committee observed as follows :

*Srivastava, J.*

‘There can be no doubt that, as pointed out by Lord BLANESBURGH, a proviso of this nature is inserted in the mortgage deed ‘exclusively for the benefit of the mortgagees,’ and that it purports to give them an option either to enforce their security at once or if the security is ample to stand by their investment for the full term of the mortgage. If on the default of the mortgagor—in other words by the breach of his contract—the mortgage money becomes immediately ‘due’, it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagees is, in effect, converted into an option in the mortgagor. For if the latter, after the deed has been duly executed and registered, finds that he can make a better bargain elsewhere he has only to break his contract by refusing to pay the interest, and ‘*co instanti*’ as Lord BLANESBURGH says, he is entitled to redeem. If the principal money is ‘due’, and the stipulated term has gone out of the contract, it follows, in their Lordships’ opinion that the mortgagor can claim to repay it, as was recognized by WAZIR HASAN, J. in his judgment in the Chief Court. Their Lordships think that this

is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default : they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not 'become due' within the meaning of article 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him."

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The material provisions of the deed upon which the decision of their Lordships was founded were similar to the provisions of the deed in the present case. It can hardly be questioned that the provisions contained in clauses 8 and 16 were inserted in the deed exclusively for the benefit of the mortgagees. If the defendant's argument is to be accepted, the mortgagees are not entitled to any benefit from them. My reading of the observations of their Lordships quoted above is that in such cases mere default of the mortgagor is not enough to make the mortgage money become immediately due. If such were the case it would convert what was allowed as an option to the mortgagee into a compulsion. What is necessary is that the mortgagee must take some appropriate step to exercise the option reserved to him. As soon as he does so, the mortgage money becomes due giving rise both to the mortgagor's right to redeem and the mortgagee's right to enforce his security. The remarks of Lord BLANESBURGH in *Pancham v. Ansar Husain* (1), which were considered to be of great weight in *Lasa Din v. Gulab Kunwar* (2), seem to me to make the position quite clear. His Lordship remarked as follows :

"Whatever else in relation to such provisos as the present may be open to debate, one thing is clear,

(1) (1926) L. R., 53 I. A., 187.

(2) (1932) I. L. R., 7 Luck., 442—  
L. R., 59 L. A., 376.

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namely 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* (the italics are mine) to make the mortgage moneys immediately due . . .”

*Srivastava, J.* In the present case when the defendant made default in payment in full of two instalments of interest, the plaintiffs took appropriate action to exercise the option which they had by sending a notice demanding payment of the mortgage money. They followed it up with the institution of the present suit. The result, to my mind, is that the mortgage money became due as soon as the option was exercised.

The present case is almost on all fours with the decision of their Lordships of the Judicial Committee on an appeal from the Court of the Recorder of Rangoon in *Yeo Htean Sew v. Abu Zaffar Koreski* (1). In this case the mortgage deed contained covenants for payment at the expiration of a year from its date with interest to be paid month by month, in the month following that for which it should be due and to run on from the date of the mortgage at the same rate until the money borrowed and the interest thereon should be paid. It was also covenanted that if before the end of the year the mortgagor should make default in payment of the interest during one month after it had become due, in that case the principal and interest should thereupon become claimable. With the latter requirement the mortgagor failed to comply, not paying the interest within the stated time. It was held that the suit was not premature and the plaintiff was given a decree for the principal and the whole of the interest due.

The learned counsel for the defendant also made reference to the decision of their Lordships of the Judicial Committee in *Mohammad Sher Khan v. Raja Seth Swami Dayal* (2). This case does not seem to me to be at all in point. It is an authority for the proposition that as

(1) (1900) I. L. R., 27 Cal., 938.

(2) (1921) L. R., 49 I. A., 60.

section 60 of the Transfer of Property Act is unqualified in its terms and contains no saving provision as other sections do in favour of contracts to the contrary, the right to redeem given to the mortgagor by this section cannot be fettered by any stipulations to the contrary. No such question arises in this case. For the above reasons I am of opinion that the suit is not premature and decide issue No. 1 in the negative.

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*Srivastava J.*

*Issue No. 4*—The defendant does not dispute the correctness of the amount claimed to be due under the mortgage. The claim must, therefore, be decreed in full.

The result, therefore, is that I decree the plaintiffs' claim for Rs.8,17,794-9-11 with costs of the suit and future interest at the contractual rate on the aggregate amount from the date of suit till the 1st of August, 1933. Interest subsequent to 1st August, 1933, till realization will be at 6 per cent. per annum. A preliminary decree for sale will be prepared in terms of Order XXXIV, rule 4 of the Code of Civil Procedure. As no adjudication has been made about the plaintiffs' right for a personal decree in case the proceeds of sale are found insufficient, clause 3 of the prescribed form will be deleted.

*Appeal allowed.*