

cent. per annum, which as the rate which is generally allowed for *pendente lite* and future interest, cannot be said to be in any way unreasonable.

On this view there is no force in the present appeal which accordingly fails and is dismissed with costs.

Appeal dismissed.

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THE
DEPUTY
COMMISSIONER,
KHERI
v.
THAKUR
BRIJENDRA
BAHADUR
SINGH

APPELLATE CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB.
Hamilton*

SHEO KUMAR AND ANOTHER (APPELLANTS) v. MUNNU
SINGH AND OTHERS (RESPONDENTS)*

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March, 28

*Res judicata—Mortgage—Suit for possession by mortgagee—
Amount due on mortgage determined in suit for possession—
Redemption suit brought subsequently—Decision regarding
amount due, whether operates as res judicata.*

Where a suit is brought for possession of the mortgaged property by the mortgagee and in that suit it became necessary to determine the amount due on the mortgage, the decision regarding the amount due on the mortgage in that suit operates as *res judicata* in a subsequent suit for redemption of the mortgage. *Phula Singh v. Bur Chand (1)*, relied on.

Mr. Hargovind Dayal Srivastava, for the appellants
Mr. K. N. Tandon, for the respondents.

ZIAUL HASAN and HAMILTON, JJ.:—This second appeal against a decree of the learned Civil Judge of Hardoi arises out of a suit for redemption brought by Munnu Singh, respondent No. 1.

The mortgage sought to be redeemed is dated the 26th July, 1888. It was made by one Deo Singh in respect of one and a quarter biswas of village Sujeha and one and a quarter biswas of village Gaur, in favour of Har Charan, predecessor-in-interest of respondents

*Second Civil Appeal No. 7 of 1937, against the order of Mr. Ali Hammad, Civil Judge of Hardoi, dated the 24th September, 1936.

(1) (1917) 39 I.C., 250.

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2 to 4, for a sum of Rs.600. The mortgage was made for a period of three years and it was provided that in case of default in payment of interest, the mortgagee would be entitled to get possession of the mortgaged property. On the 19th September, 1893, a bond for Rs.200 was executed by Deo Singh in favour of the mortgagee Har Charan in lieu of a year's arrears of interest on the mortgage-deed of 1888. About a year later, that is on the 26th October, 1894, another bond for Rs.100 was executed by Deo Singh in lieu of interest due on the bond of the 19th September, 1893.

It appears that on the 12th August, 1898, Har Charan, mortgagee, sued for possession of the mortgaged property in terms of the mortgage-deed and on the 24th February, 1899, his suit was decreed laying down that if a certain sum which was found due on the mortgage-deed and the later bonds together with costs of the suit be not paid by the 15th June, 1899, the mortgagee would be put in possession of the property. This decree was passed in favour of respondents 2 to 4 as Har Charan had died during the pendency of the suit and it was not appealed against by any of the parties.

On the 8th February, 1907, respondents 2 to 4 sold their mortgagee rights in both the villages to Puttu Lal, father of appellant No. 2 and grandfather of appellant No. 1, and Arjun Prasad. Arjun Prasad died and it is not disputed that his interest devolved on Puttu Lal so that the present appellants are now the representatives-in-interest of the original mortgagee.

Deo Singh left two sons, Kallu Singh (the present respondent No. 5) and Chhutkan Singh, who left a widow Mst. Dulari. On the 5th January, 1914, Kallu Singh and Mst. Dulari sold the Sujehtha property to Puttu Lal and Arjun Prasad so that the mortgage so far as it related to the Sujehtha property became extinguished.

On the 20th January, 1919, Munnu Singh, plaintiff-respondent purchased 12½ biswansis out of the mortgaged property of village Gaur at a court auction sale and thereupon he brought the present suit for redemption of 12½ biswansis of Gaur on the ground that the integrity of the mortgage had been broken by Puttu Lal and Arjun Prasad purchasing the equity of redemption in the Sujehta property. He offered to pay Rs.332-6-9 for redemption of 12½ biswansis of Gaur.

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The defendants-mortgagees contested the suit and pleaded that the plaintiff was not entitled to redeem the property without payment of the proportionate amounts due on the bonds Exs. A-11 and A-12, of the 19th September, 1893 and 26th October, 1894, respectively.

Both the courts have repelled this plea and holding that the decree of the 24th February, 1899, (Ex. 7) operates as *res judicata* so far as the amount due to the mortgagees is concerned, the plaintiff is entitled to redemption on payment of Rs.332-6-9. The mortgagees bring this second appeal.

It is urged on behalf of the appellants that in the mortgagee's suit of 1898, it was not necessary to determine the amount due and that therefore the decree in that suit so far as it fixed the amount due cannot operate as *res judicata* in the present suit. We are of opinion that this argument is not sound. In the suit of the mortgagee the mortgagor's son Kallu Singh and some subsequent transferees were parties and Kallu Singh challenged the validity of the mortgage on the ground that it was not made for legal necessity. It was therefore necessary for the court to determine the amount due on the mortgage not only on the plea raised by Kallu Singh but in order to give the subsequent transferees an opportunity of redeeming the mortgage. The case was very similar to that of *Phula Singh v. Bur Chand* (1) decided by a Bench of the Punjab Chief Court. In that case also a mortgagee had sued for

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possession of the mortgaged property and in that suit the charge on the land was fixed at a certain amount and when the purchaser of the equity of redemption brought a suit for redemption, it was held that the question of the amount due on the mortgage was *res judicata* by reason of the decree in the mortgagee's suit for possession. In that case the decree in the mortgagee's suit for possession was appealed from but was confirmed, while in the present case both the parties submitted to the decree and no appeal was filed. The argument was raised in that case also that the findings as to the actual amount of principal and interest due were *obiter dicta* and not binding on the parties but the learned Judge remarked:

"... in the 1902 case, Gopi Mal (the mortgagee) was suing the heirs of the mortgagor who pleaded that the mortgage by their father was without necessity and according to custom was not binding upon them. Before Gopi Mal could get possession under his mortgage he had to prove that it was executed for valid necessity. If he had failed to prove that there was any necessity for the mortgage he could not have obtained possession at all. One of the necessary issues in the case was whether the mortgage of 1891 was executed for valid necessity. Misra Jwala Sahai (Divisional Judge, Lahore) found that Rs.300 out of the mortgage debt was raised for valid necessity. In giving possession he had had to decide how much was the valid charge which the mortgagee had upon the land and he actually did decide that Rs.300 principal and Rs.400 interest were due on the footing of the mortgage. One of the issues was: To what relief Gopi Mal was entitled; and the court decided that he was entitled to possession in lieu of the principal sum of Rs.300 plus Rs.400 interest. It therefore gave him a decree for possession in lieu of Rs.700 but it further allowed the defendants in that suit two months' time wherein to pay the amount found due and said that Gopi Mal would only get possession if the sum was not paid within that period... In order to pass the decree which he did pass the latter (Mr. Jwala Sahai) had found out exactly what Gopi Mal's charge upon the land was. In other words the ascertainment of the exact amount was necessary for the decree as passed

and that decree is binding on the parties to that suit. We therefore hold that the question of the amount due on the mortgage of 1891 is clearly *res judicata* by reason of the decree of Misra Jwala Sahai which was confirmed by the appellate court."

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In the present case the decree, Ex. 7 not only fixed the amount due on the mortgage and on the later bonds but also declared that interest would cease to run on the mortgagee obtaining possession of the property. As we have said above, this decree was not appealed against by any of the parties and has thus become final between them. We may note that while in the Punjab case referred to above the deeds of further charge were not taken into consideration when the court passed its decree in the mortgagee's suit for possession, in the present case the mortgagee had himself given in his plaint an account of what was due to him not only on the original mortgage-deed but also on the later bonds or the so-called deeds of further charge and it was on a consideration of his own pleadings that the court fixed the amount due and ordered that interest would cease on the mortgagee obtaining possession of the property.

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J.J.

Apart from the question of *res judicata* we are of opinion that on the merits also the decree passed by the lower courts is perfectly just and proper. We have already noted that while the bond Ex. A-11 was executed for one year's interest due on the mortgage, the previous year's interest having been realised by the mortgagee, the other bond Ex. A-12 was executed in lieu of the interest due on the bond, Ex. A-11. As the mortgagees obtained possession of the property in lieu of interest on the mortgage, they are not entitled to any further interest in the shape of a claim on Exs. A-11 and A-12. The provisions of the United Provinces Usurious Loans Act will also perhaps relieve the plaintiff of the interest now claimed.

We therefore confirm the decree of the lower appellate court and dismiss the appeal with costs.

Appeal dismissed.