

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Campbell.

NARINJAN SINGH AND OTHERS (PLAINTIFFS)—
Appellants,

versus

Diwan CHARN DAS (DEFENDANT)—Respondent.

Civil Appeal No. 959 of 1918.

Redemption of Mortgages (in Punjab) Act, 11 of 1913, section 4—suit by mortgagee for a declaration that the mortgagor is not entitled to redeem the land on payment of amount fixed by the Assistant Collector—whether competent, after mortgagor has got possession—objection taken for first time in Appellate Court.

Held, that the objection that plaintiff-mortgagee could not sue for a declaration because the defendant-mortgagor had got possession on payment of the amount fixed by the Assistant Collector for redemption should not be allowed to be raised now (1) because it was not taken in the Court below and (2) that it has no force because under the clear wording of section 12 of the Redemption of Mortgages Act, the plaintiff was entitled to sue for a mere declaration.

Second appeal from the decree of M. H. Harrison, Esquire, District Judge, Sialkot, dated the 14th January 1918, affirming that of Mir Itadullah, Subordinate Judge, 1st Class, Sialkot, dated the 15th August 1917, dismissing the claim.

The judgment of the Court was delivered by—

SCOTT-SMITH J.—The brief facts of the case, out of which the present second appeal arises, are as follows :—

On the 16th August 1889, Diwan Lachman Das, father of the present defendant-respondent, mortgaged some 39 *ghumans* of land to *Bhai* Sobha Singh, plaintiff-appellant, for Rs. 600. It was agreed that the produce of the land was to be taken by the mortgagee in lieu of interest on Rs. 300, while the remaining Rs. 300 was to carry interest at the rate of 2 per cent. *per mensem*, that the mortgagor was not entitled to redeem the land before the expiry of ten years and that on his failing to redeem the land in the month of *Magh* after that year the land would be considered as sold to the mortgagee. The defendant's father did not

1922

March 21.

1922

NARINJAN SINGH

v.
CHARN DAS.

pay the mortgage money and the plaintiff on his part took no steps for foreclosure under the terms of Regulation XVII of 1806. On the 14th February 1917, the defendant applied under section 4 of Act II of 1913 for redemption of the land. The Assistant Collector held that the defendant was entitled to redeem the land on payment of Rs. 1,392, i.e., Rs 600 principal and Rs. 792 interest on Rs. 300 for eleven years at the stipulated rate. The plaintiff then brought the present suit for a declaration that the defendant was not entitled to redeem the land except on payment of Rs. 600 principal and Rs. 1,980 interest due from the date of the execution of the deed up to the date of the institution of the suit. The Courts below held, following *Balanda v. Fateh Din* (1), that the plaintiff was only entitled to eleven years' interest and dismissed the suit.

The plaintiff has filed a second appeal to this Court and it is urged on his behalf (1) that the terms of the mortgage deed show that it was the intention of the parties that interest should continue to be paid even after the due date and up to the date of redemption and (2) that even if no such agreement can be implied, then in accordance with the decision of the Full Bench in *Motan Mal and others v. Muhammad Bakhsh and others* (2) the mortgagee is entitled to *post diem* damages which should be calculated at the rate of interest agreed upon in the deed.

In the first place, we find it necessary to refer to an objection raised by counsel for the respondent as to the form of the suit. He urges that as the defendant has got possession of the land after redemption, the plaintiff should have sued either to be again put in possession until payment of the full amount claimed by him, or for recovery of the sum to which, he alleges, he is entitled. Now, there was no objection raised in the Courts below as to the form of the suit, and we therefore do not think that such an objection should be allowed at the present stage. Moreover, section 12 of the Redemption of Mortgages Act, II of 1913, lays down that any party aggrieved by an order made under sections 6, 7, 8, 9 or 11 of the Act may institute a suit to establish his right

(1) 57 P. E., 1914.

(2) (1922) I. L. R. 3 Lah. 200 (F.B.)

in respect of the mortgage. This clearly indicates that an aggrieved party may institute a suit to have his right declared. No doubt the plaintiff might have sued for possession of the land, but, having regard to the clear wording of section 12 of the Act, we consider that he was entitled to sue for a mere declaration.

The terms of the mortgage deed show that the mortgage was for ten years and that it was also stipulated that the mortgagor could not redeem until the month of *Magh*. The date of the mortgage is 16th August 1889 and, therefore, there could be no redemption before about the 12th January 1900, or nearly 10½ years after the date of the execution. We cannot suppose that the parties to the deed intended that interest should not be payable for the whole of this period though it exceeds the ten years fixed in the deed. It was also stipulated that interest should be paid for the year of grace allowed by Regulation XVII of 1806 and that at the time of redemption the mortgagor was to pay the cost of repairs of a well together with interest thereon. *Diwan* Lachhman Das was not an ordinary *Zamindar* but a man of intelligence and wealth and must have perfectly understood the terms of the deed. His son, the defendant, is a pleader. After a careful consideration of the terms of the mortgage deed, we are clearly of opinion that the parties intended that interest should not cease upon the arrival of the date fixed for redemption, but should continue until redemption. Under these circumstances, there is no necessity for us to refer to the decision of the Full Bench in the case of *Motan Mal and others v. Muhammad Bakhsh and others* (1) referred to above. We hold that the plaintiff is entitled to a decree as claimed, namely, that he is entitled to receive from the defendant prior to redemption a sum of Rs. 2,580.

We accordingly accept the appeal, and, setting aside the decree of the Lower Appellate Court, give the plaintiff a decree as above together with costs in all Courts.

Appeal Accepted.

1922

NABINJAN SINGH

v.
CHARN DAS.