

We accordingly hold that the action brought by the plaintiff comes within the *ambit* of the Act, and as it was brought after the expiry of twelve years from the date mentioned in the schedule to the Act, it is barred by time. We therefore accept the appeal and reversing the judgment of the Single Bench dismiss the suit with costs throughout.

Appeal accepted.

FULL BENCH.

Before Sir Shadi Lal, Chief Justice, Sir William Chevis, Mr. Justice Scott-Smith, Mr. Justice LeRossignol, and Mr. Justice Broadway.

MOTAN MAL, ETC. (DEFENDANTS)—*Appellants,*

versus

MUHAMMAD BAKHSH AND OTHERS (PLAINTIFFS),
AND AHMAD KHAN (DEFENDANT)—*Respondents.*

Civil Appeal No. 757 of 1917.

Mortgage—Interest after due date—in absence of express or implied stipulation in the deed—post diem damages—allowable at what rate and for what period.

Held, that when the mortgage deed contains no express stipulation for the payment of interest after the due date, the correct rule is that the law raises no presumption either in favour of or against an implied intention to pay interest after the due date.

Bulanda v. Fateh Din (1), not followed.

Bundesri Naik v. Ganga Saran Sahu (2), and *Sardar Umrao Singh v. Sardar Thakar Singh* (3), referred to.

The determination of the question rests entirely upon the interpretation of the instrument and no definite rule of construction can be laid down except that the deed must be viewed as a whole, and the Court should avoid an interpretation which would ascribe to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest and that the creditor shall have no remedy provided by the contract, but shall be driven to treat the contract as broken and to seek for damages. It is more reasonable to ascribe to the parties the intention of making a perfect contract.

(1) 57 P. R. 1914.

(2) (1897) I. L. R. 20 All. 171 (P. C.).

(3) 77 P. R. 1898.

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Mathura Das v. Raja Narindar Bahadur (1), followed.

If the Court, after taking into consideration all the terms of the instrument in the light of these observations, reaches the conclusion that there is neither an express nor an implied covenant for payment of interest after due date, then the mortgagee cannot recover interest, as such, after that date.

Held, however, that the mortgagee is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest agreed upon, but the Court has discretion to reduce the rate, if it is found to be unusual.

Chajmal Das v. Brij Bhukan Lal (2), followed.

Held also, that as regards the period for which interest by way of damages can be recovered, if the mortgagee invokes the assistance of the Court in the capacity of plaintiff he can recover damages only for the period prescribed by the law of limitation for a suit for compensation for the breach of the contract. If on the other hand, he happens to be a defendant he is entitled to recover damages for the entire period during which the principal sum has remained unpaid.

Dingle v. Coppen (3), and *In re Lloyd* (4), approved.

Jawahir Mal v. Raja Shah (5), disapproved.

Tek Chand (Jagan Nath with him) for the appellants—In cases of mortgages containing a stipulation for payment of interest, interest should be allowed for the full period, during which the mortgage debt remains unpaid, unless there is a condition in the mortgage deed indicating cessation of interest after the due date. It is for the mortgagor to prove that it was intended that interest was to cease on the stipulated date. *Sardar Umrao Singh v. Sardar Thakar Singh* (6), *Radha Kishen v. Karim Ullah* (7), *Mota Singh v. Bishen Singh* (8), *Allah Din v. Fateh Din* (9), *Thakar Das v. Mst. Nandi Bai* (10), *Naklu Mal v. Phagu Shah* (11), and *Akbar Hussain v. Raghunandan Das* (12).

There are certain rulings laying down that *post dtem* interest for 6 years only should be allowed,

(1) (1896) I. L. R. 19 All. 39 (P. C.). (7) 92 P. R. 1905.

(2) (1895) I. L. R. 17 All. 511 (P. C.). (8) 5 P. R. 1916.

(3) (1899) 1 Ch. 726. (9) 31 P. R. 1918.

(4) (1903) 1 Ch. 395. (10) 105 P. L. R. 1915.

(5) 95 P. R. 1902. (11) (1910) 6 Indian Cases 664.

(6) 77 P. R. 1898. (12) (1920) 57 Indian Cases 348.

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Jawahir Mal v. Raja Shah (1), and *Ghumandi Lal v. Kanhaya Lal* (2). These rulings are unsound. There is no reason why the right of the mortgagee-defendant to claim interest for the whole period should be curtailed. I rely on *Mathura Das v. Raja Narindar Bahadur* (3), *Bindesri Naik v. Ganga Saran Sahu* (4), *Nityananda v. Sri Radha* (5), *Ghantayya v. Papayya* (6), *Malayappaiyar v. Pichai Asari* (7), and *Abdul Ahad v. Mahtab Bibi* (8). My alternative plea is that if there is an intention that interest shall cease, then I am entitled to damages and for the whole period. *Bulanda v. Fateh Din* (9) is not a sound exposition of law and in any case deals with the special facts of that case.

MOTT SAGAR, for the respondents—Each case ought to be decided on the construction of the terms of the mortgage deed. Three classes of cases are possible, (1) there may be an express stipulation to pay interest after the due date, (2) there may be an implied covenant to the same effect, (3) there may be no covenant at all, express or implied, in the mortgage deed regarding payment of interest after the due date. All the cases relied upon by the appellant have an implied covenant in the mortgage deed itself regarding payment of interest, but in the present case there is no implied covenant at all, and therefore, the rulings quoted by counsel for the appellant do not help him. The following rulings lay down that when there is no stipulation, express or implied, no interest should be allowed after due date:—

Sheo Chand v. Chunna (10), *Hoshnak Mal v. Sohna Mal* (11), *Mohan Lal v. Mukim* (12), *Bulanda v. Fateh Din* (9), *Kishna Mal v. Muhammad Bakhsh* (13).

(1) 95 P. R. 1902.

(7) (1915) 28 Indian Cases 195.

(2) (1919) 52 Indian Cases 320.

(8) (1914) 24 Indian Cases, 674.

(3) (1896) I. L. R. 19 All. 39 (P. C.).

(9) 77 P. R. 1914.

(4) (1897) I. L. R. 20 All. 171 (P. C.).

(10) 73 P. R. 1892.

(5) (1897) I. L. R. 20 Mad. 371.

(11) 114 P. R. 1894.

(6) (1899) I. L. R. 23 Mad. 531.

(12) 114 P. R. 1901.

(13) 52 P. L. R. 1915.

Bhagwant Singh v. Daryao Singh (1), *Balwant Singh v. Gayan Singh* (2), *Moti Singh v. Ramohari Singh* (3), and *Mussammat Sunder Dei v. Baldeo Bakhsh Singh* (4).

If damages are to be allowed, then damages for six years only should be allowed, *Jawahir Mal v. Raja Shah* (5), and *Gita Prasad Singh v. Ragho Singh* (6).

Tek Chand replied.

Second appeal from the decree of Khan Sahib Sheikh Amir Ali, District Judge, Multan, dated the 11th December 1916, varying that of Misra Jwala Sahai, Senior Subordinate Judge, Multan, dated the 31st May 1916 and decreeing the claim.

The judgment of the Full Bench was delivered by—

SIR SHADI LAL C. J.—The propositions of law, which have been formulated by the Division Bench for determination by the Full Bench, are in the following terms:—

- (1) If in an instrument of mortgage there is no stipulation as to the continuance of interest after the due date, and the intention of the parties cannot be deduced from the instrument itself, is the creditor ordinarily entitled to interest at the rate specified in the deed for the entire period during which the mortgage money remains unpaid?
- (2) If he is not so entitled but entitled only to receive *post diem* damages, should those damages be awarded for the same period and ordinarily at the rate as that specified in the instrument of mortgage?

On the first question we have been referred to a large number of decided cases, most of which do not enunciate any principle of law, but determine only the question whether the terms of the particular contract entered into by the parties lead to an inference that

(1) (1889) I. L. R. 11 All. 416. (4) (1914) 38 Indian Cases 161, 167.
 (2) (1913) I. L. R. 35 All. 534. (5) 95 P. B. 1902.
 (3) (1897) I. L. R. 24 Cal. 699 (F. B.). (6) (1917) 40 Indian Cases 809.

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they intended that the mortgagee should recover interest after the due date. Whether interest *post diem* should or should not be allowed is a question which depends upon the interpretation of the instrument of mortgage. If there is an express covenant on the subject one way or the other, then the Court has only to give effect to that covenant. The difficulty, however, arises when the deed contains no express stipulation, and the question then is whether an implied stipulation to pay interest after the due date can be deduced from the terms of the instrument. It is clear that for a solution of a problem of this character, which depends upon the particular terms of each contract, no general rule can be laid down, and it is, therefore, unnecessary to travel through the mass of authorities which have been cited by the learned Advocates on both sides. On behalf of the mortgagor, we are asked to endorse the rule, which appears to have been enunciated in *Bulanda and Nawab v. Fateh Din and others* (1), that if the transaction entered into by the parties is a mortgage by way of conditional sale, then, in the absence of an express stipulation, it must be presumed that interest was not intended to be paid after the due date. There is, however, no valid reason for laying down such a broad proposition. Indeed, there are several cases decided by the Privy Council and the High Courts dealing with mortgages by way of conditional sale in which interest after the due date has been allowed simply on the strength of an implied agreement to that effect, *vide inter alia*, *Bindesri Naik v. Ganga Saran Sahu and others* (2) and *Sardar Umrao Singh v. Sardar Thakar Singh* (3).

On the other hand, it is urged on behalf of the mortgagee that where the mortgage deed contains a covenant for the payment of the principal debt with interest at a certain rate on a certain day, and is silent as to the *post diem* interest, then in the absence of an express provision to the contrary, a further contract for the continuance of the same rate of interest until actual payment must be implied. There are no doubt *dicta*

(1) 57 P. R. 1914.

(2) 1897) I. L. R. 20 All. 171 (P. C.).

(3) 77 P. R. 1898.

to that effect in some judgments, but the correct rule, in my opinion, is that the law raises no presumption either in favour of, or against, an intention to pay interest after the due date.

The determination of the question rests entirely upon the interpretation of the instrument, and in this connection no definite rule of construction can be laid down except that the deed must be viewed as a whole, and that the Court should, if possible, avoid an interpretation which would, to use the language of their Lordships of the Privy Council in *Mathura Das and another v. Raja Narindar Bahadur* (1), ascribe to the parties—

“An intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken and to seek for damages which lie in the discretion of a jury or a Court, and are subject to a different law of prescription.”

As observed by their Lordships,

“It is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very ordinary kind and suitable to the ordinary expectations of persons entering into a mortgage transaction.”

If the Court, after taking into consideration all the terms of the instrument in the light of the observations quoted above, reaches the conclusion that there is neither an express nor an implied covenant for payment of interest after the fixed date, then the mortgagee cannot recover interest as such after that date.

The mortgagee is, however, entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The latter by withholding the money has deprived his creditor of the interest which he could have earned, and should compensate him for the loss thus caused to him. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties, vide *Chajmal Das v. Brij Bhukan Lal and another* (2). There is, however, no rule of law making that rate necessarily the measure of damages, and the Court has discretion to reduce the

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rate if it is found to be unusual. The discretion is, however, not an arbitrary one ; it is a judicial discretion and must proceed upon sound principles. Whether or not the stipulated rate is unusual must depend upon various circumstances, *e.g.*, the risk undertaken by the creditor, the financial condition of the debtor, the nature of the security offered by him, the stringency or otherwise of the money market in the locality, etc.

The period, for which interest by way of damages for the breach of the contract can be recovered, is a matter upon which there is some difference of judicial opinion. It is stated in some cases that this period cannot exceed six years. Now, I am unable to understand the *rationale* of the rule limiting the right of the mortgagee to damages for a period of six years only, even if he happens to be defendant in the case. The rule of law is beyond doubt that where the mortgagor commits a breach of the contract, he is liable to pay damages to the mortgagee, and there is no reason why he should not pay damages for the entire period during which he has withheld the money and prevented the mortgagee from earning interest. So far as the substantive law is concerned, there is no provision which can be invoked for confining his liability to any period less than the period of his default. It seems to me that the rule allowing damages only for six years owes its origin to the law of limitation but, it is an elementary principle of law that limitation only bars the remedy, but does not extinguish the right.

Now, article 116 of the second schedule to the Limitation Act prescribes a period of six years for a suit to recover damages for the breach of a contract embodied in a registered instrument, and it is, therefore, clear that if the mortgagee invokes the assistance of the Court in his capacity as plaintiff, he can recover damages only for the period prescribed by that article, the rest of his claim being barred by time. If, on the other hand, he happens to be a defendant as in a suit for redemption there is no valid reason why the Court should award him damages only for six years and should deprive him of his right to recover damages for the remaining period during which the principal sum has been withheld. As pointed out above, the bar of time applies only to the remedy of the plaintiff ; it has

no effect whatsoever on the plea of the defendant. In the judgments such as *Jawahir Mal v. Raja Shah and others* (1), which curtail the right of the mortgagee-defendant in the manner indicated above, I have sought in vain for any reason which would justify this interference with the right which he undoubtedly possesses under the law of contract. It seems to me that there is nothing peculiar about the period of six years and that the sole ground for adopting this period is furnished by the fact that under the law of limitation as it stands a mortgagee suing for damages on the footing of a registered instrument can recover damages sustained by him during the preceding six years only, and that the rest of his claim would be barred by time. Indeed it is difficult to see why he should get damages even for the entire period of six years, if the mortgage in his favour was by means of an unregistered instrument which could be the case if the principal sum was less than Rs. 100. It appears that the rule of six years was the outcome of the law of limitation operating upon the claim of the mortgagee-plaintiff, and that it has been applied also to the mortgagee-defendant, though the reason upon which the rule was founded has no application to the latter.

It is to be observed that the English law as expounded in the recent authorities recognises no such limitation upon the right of the mortgagee-defendant. As laid down in *Dingle v. Coppen* (2) though a mortgagee taking proceedings to enforce his security is entitled only to six years' arrears of interest, he may in a redemption action recover all arrears of interest though they may exceed six years. This principle is reaffirmed in *In re Lloyd* (3).

My reply to the first question, therefore, is that in the absence of a stipulation, express or implied, the mortgagee is not entitled to interest after the due date.

To the second question I would return the following answer :—

(1) 95 P. R. 1902,

(2) (1899) 1 Ch. 726.

(3) (1908) Ch. 585.

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The mortgagee is entitled to damages to be calculated ordinarily at the covenanted rate of interest and for the entire period during which the principal sum has remained unpaid, unless the mortgagee is himself the plaintiff, in which case the period would be the same as that prescribed by the statute of limitation for a suit for the recovery of damages on the footing of the mortgage in his favour.

CHEVIS J.—I concur. The law of limitation limits the time within which persons may seek relief from the Court and thus curtails the rights of a plaintiff. This law has, I consider, often been wrongly applied to curtail the defence of a defendant.

SCOTT-SMITH J.—I concur.

LEROSSIGNOL J.—I agree with the learned Chief Justice and would add that in the case of mortgages comprising a stipulation of conditional sale, a covenant to pay *post diem* interest up to date of redemption must be implied unless there are very strong reasons to the contrary. On the face of the contract in such cases, it is the clearly expressed intention of the parties that if there be no redemption on due date there shall be no redemption at all and if owing to waiver or the *laches* of the mortgagee, the mortgagor is competent to enforce redemption after due date, it cannot be supposed that the inaction of the mortgagee was intended by the parties to afford the mortgagor an advantage not contemplated by the contract.

BROADWAY J.—I concur with the learned Chief Justice.

A. B.

Case returned to Division Bench