

APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Agha Haidar.

MANGAT RAI (PLAINTIFF) Appellant

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versus

BABU SINGH AND ANOTHER (DEFENDANTS)

May 4.

Respondents.

Civil Appeal No. 1723 of 1926.

Interest—Mortgage—Compound interest on default of payment—whether penal—Indian Contract Act, IX of 1872, section 74—Civil Procedure Code, Act V of 1908, section 34—whether applicable.

Held, that in the absence of proof of undue influence a provision for charging compound interest at the same rate as simple interest, on failure of the mortgagor to pay the principal or interest on the due date, is perfectly legal and cannot be relieved against on the mere ground of hardship, even though the principal sum now claimed exceeds the amount originally advanced.

Aziz Khan v. Duni Chand (1), *Balla Mal v. Ahad Shah* (2), *Allah Din v. Fateh Din* (3), and *Khota Ram v. Nawaz* (4), followed.

Held further, that such a provision is not in itself illegal or penal within the meaning of section 74 of the Contract Act provided that the compound interest is chargeable at the same rate as that at which simple interest was payable.

Sunder Koer v. Rai Sham Krishen (5), followed.

Held, also, that where there is a stipulation in the deed for the payment of compound interest at a rate *higher* than that of the simple interest originally payable under the deed, the mortgagee may be allowed compound interest at the *same rate* as that at which simple interest was payable under the terms of the deed.

Baid Nath v. Shamanand Das (6), and *Rameswar Prosad Singh v. Rai Sham Kishen* (7), followed.

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- (1) 101 P. R. 1918 (P. C.) (4) (1922) I. L. R. 4 Lah. 76.
 (2) 124 P. R. 1918 (P. C.) (5) (1906) I. L. R. 34 Cal. 150, 158 (P. C.).
 (3) 31 P. R. 1918. (6) (1894) I. L. R. 22 Cal. 143, 145.
 (7) (1901) I. L. R. 29 Cal. 43.

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Held, lastly, that section 34 of the Civil Procedure Code has no applicability to a suit for recovery of the amount due on a mortgage, and the Court has no power to award interest at other than the contractual rate (provided it is not penal) up to the date fixed for payment.

Hargoandas v. Mohanbhai (1), per Sir L. Jenkins O. J. and *Rajwanta Kunwar v. Shyam Narain Singh* (2), followed.

Mulla's Civil Procedure Code, 8th Edition, page 106, referred to and approved.

First appeal from the decree of Rai Sahib Lala Shibbu Mal, Senior Subordinate Judge, Ambala, dated the 15th March 1926, directing the defendants to pay to the plaintiff the sum of Rs. 4,173-12-0, etc.

SHAMAIR CHAND and BASANT KRISHAN, for Appellant.

Nemo, for Respondents.

JUDGMENT.

TEK CHAND J.

TEK CHAND J.—On the 15th of February 1922 defendants-respondents Babu Singh and Tota Singh executed a deed of mortgage without possession in favour of Mangat Rai, plaintiff-appellant, in respect of certain house property situate in the town of Ambala for Rs. 2,700. It was stipulated that interest on the principal sum secured would be paid six-monthly at Re. 1-4-0 *per cent. per mensem* and on failure to so pay it, compound interest at the same rate would be charged. It was further provided that if the mortgagors failed to pay interest for two successive half-years the rate of interest would be enhanced to Rs. 2 *per cent. per mensem* with retrospective effect from the date of the execution of the deed and in that event compound interest would also be charged at this enhanced rate. The deed specifically

(1) (1900) 2 Bom. L. R. 225.

(2) (1914) I. L. R. 36 All. 220.

authorised the mortgagee to recover the principal with interest and compound interest and costs of litigation (if any) from the hypothecated property as well as from the other moveable and immoveable property of the mortgagors and from their persons.

The mortgagors having paid nothing in discharge or reduction of their liability for the principal or interest, the mortgagee, on the 6th of October 1925, instituted the suit, out of which this appeal has arisen, for recovery of Rs. 6,000, consisting of Rs. 2,700 on account of the principal and Rs. 3,300 due as interest and compound interest calculated at the rate of Rs. 2 *per cent. per mensem* from the date of the execution of the deed. Of the defendants Tota Singh did not appear and proceedings were *ex-parte* against him. Babu Singh, defendant, admitted the execution and consideration of the deed but prayed for reduction of interest. The issues framed were:—

- (1) Is the interest claimed excessive or exorbitant?
- (2) Can the defendants claim reduction under the Usurious Loans Act or under any other law? If so, to what extent?
- (3) What should be held to be the valid charge on the date of the suit?

The learned Senior Subordinate Judge in a brief judgment, which recites the terms of the mortgage-deed inaccurately in several particulars and which does not discuss the legal points in any detail, allowed simple interest at the rate of Re. 1-4-0 *per cent. per mensem* till the date of the suit, amounting to Rs. 1,473-12-0 and rejected the rest of the plaintiff's claim. He accordingly passed a decree for Rs. 4,173-12-0 with proportionate costs and future interest on

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Rs. 2,700 at Rs. 6 *per cent. per annum* from the date of suit till realisation. He also remarked that the decretal amount could be recovered from the hypothecated property only, as no relief had been asked against the person or other property of the defendants.

The plaintiff has appealed and in his memorandum of appeal he does not claim interest or compound interest at the enhanced rate. Mr. Shamair Chand, who appeared for the appellant, has conceded that the provision as to charging of enhanced interest at Rs. 2 *per cent. per mensem* from the date of the mortgage transaction is penal and he is not claiming interest or compound interest at that rate. The principal point for determination, therefore, is whether the plaintiff-appellant is entitled to claim compound interest at Re. 1-4-0 *per cent. per mensem* with six-monthly rests as provided for in the first part of the deed. The learned Subordinate Judge has held that this provision is also penal and the mortgagee is not entitled to recover compound interest at all. He has, however, given no reasons to support his finding nor has he cited any authorities on which this conclusion is based. The rule of law is now firmly established that, in the absence of proof of undue influence, a provision for charging compound interest at the same rate as simple interest, on failure of the mortgagor to pay the principal or interest on the due date, is perfectly legal and cannot be relieved against on the mere ground of hardship. In the present case undue influence was not pleaded, much less proved, and, therefore, the case does not fall within the exception. All that the respondents urged was that the term as to payment of compound interest was harsh. In *Aziz Khan v. Duni Chand* (1), interest and compound interest at the rate

of 25 *per cent. per annum* had been made payable and though it was found that the terms of the contract were onerous, their Lordships ruled that Courts had no power to refuse to give effect to them. Mr. Ameer Ali, who delivered the judgment of the Judicial Committee observed:—"The transaction was undoubtedly improvident but in the absence of any evidence to show that the money-lender had unduly taken advantage of his position, it is difficult for Courts of justice to give relief on grounds of simple hardship." Similarly in *Balla Mal v. Ahad Shah* (1), Lord Atkinson laid down that "there was nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accruing due upon it which he has contracted to pay. The borrower cannot acquire merit simply by breaking his contract." It was definitely held that "the mere fact that the principal sum now claimed exceeds enormously the amount originally advanced will be no ground for holding the transaction unconscionable." See also the remarks of the learned Chief Justice to the same effect in *Allah Din v. Fateh Din* (2) and of Campbell J. in *Khota Ram v. Nawaz* (3). It must, therefore, be held that the condition securing to the mortgagee compound interest at Re. 1-4-0 *per cent. per mensem* is not in itself illegal. That it is not *penal* within the meaning of section 74 of the Contract Act is also well settled by a uniform series of decisions of all the High Courts, based on the leading Privy Council ruling in *Sundar Koer v. Rai Sham Krishen* (4), where a distinction is drawn between

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(1) 124 P. R. 1918 (P. C.). (3) (1922) I. L. R. 4 Lah. 76.

(2) 31 P. R. 1918.

(4) (1906) I. L. R. 34 Cal. 150, 158 (P. C.)

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cases in which compound interest is chargeable at the same rate at which simple interest was payable on the principal sum, and cases where it is chargeable at a rate exceeding it. It was ruled that in the former class, the condition as to payment of compound interest is perfectly legal and is not penal, whereas in the latter class, "compound interest at a rate exceeding the rate of interest payable on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty." If this condition is in itself perfectly legal and enforceable, I fail to see how it becomes illegal and unenforceable merely because there is to be found in the deed a further unenforceable condition that on default of payment of interest for two successive half-years interest and compound interest would be chargeable at an enhanced rate. The condition to pay interest at the rate originally fixed is an integral part of the primary obligation created under the deed and is wholly separate from and independent of the default clause under which interest and compound interest at enhanced rate was to be charged. Its validity is in no way affected by the decision that the condition to pay enhanced interest is penal. The question was considered by the Calcutta High Court in *Baid Nath v. Shamanand Das* (1) where the rate of interest originally fixed was 15 per cent. per annum payable at the end of a year, and in default compound interest at the rate of 33½ per cent. was chargeable. The learned Judges while holding the provision for charging interest and compound interest at this enhanced rate to be penal allowed the creditor compound interest at the rate originally fixed, i.e., 15 per cent. per annum. The question was again con-

(1) (1894) I. L. R. 143, 145.

sidered by the same Court in *Rameswar Prosad Singh v. Rai Sham Kishen* (1), where it was held that though interest at the enhanced rate could not be allowed the creditor was entitled to compound interest at the same rate as that at which simple interest was payable under the terms of the bond, it being remarked that such a condition "was not penal but was a perfectly legal provision". I must, therefore, hold that the plaintiff is entitled to charge compound interest at Re. 1-4-0 *per cent. per mensem* with half-yearly rests from the date of the mortgage.

It may be noted that no attempt was made in the lower Court to bring the case within the provisions of the Usurious Loans Act, nor does the learned Subordinate Judge rely upon the provisions of that Act for reducing the rate of interest.

The learned Subordinate Judge has also gone wrong in not passing a decree in accordance with the provisions of Order XXXIV, rule 4, Civil Procedure Code, as he was bound to do. He is, further in error in remarking that no relief could be granted against the person or other property of the defendants. If the learned Judge had proceeded in accordance with the provisions of the Code, a decree should have been passed in form No. 4 (Appendix D, Civil Procedure Code) prescribed for such decrees. In that case on the property being put to sale after the expiry of six months if the sale-proceeds were found insufficient to meet the total mortgage charge, the decree-holder would have the right to apply under Order XXXIV, rule 6, Civil Procedure Code, for a personal decree against the judgment-debtor for the recovery of the balance. It will thus be seen that the learned Subordinate Judge in passing the decree under appeal

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has not only disregarded the express provisions of the Code but has also illegally deprived the plaintiff mortgagee of his statutory right to apply for a personal decree being passed against the defendant-mortgagor, a right which had in this case been further secured to him by the express terms of the deed.

There is yet another mistake in the learned Subordinate Judge's judgment. He has allowed interest at the stipulated rate up to the date of the suit only and has directed that interest from that date till realization will be payable at 6 *per cent. per annum* only. In doing so he seems to have acted under the provisions of section 34, Civil Procedure Code, but it must be remembered that that section applies only to decrees for the payment of money and has no applicability to a suit brought by a mortgagee to recover the amount due to him on foot of the mortgage executed in his favour. As remarked by Sir Lawrence Jenkins in *Hargovan Das v. Mohanbhai* (1), a mortgage decree until it reaches the stage shown by section 90 of the Transfer of Property Act (Order XXXIV, rule 6, Civil Procedure Code) cannot be said to be a decree for money. It is well settled that in passing a preliminary decree in a mortgage suit the Court has no power to award interest at other than the contractual rate up to the date fixed for payment, *Rajwanta Kunwar v. Shiam Narain Singh* (2). As pointed out by Mulla, at page 106 of his commentary on the Civil Procedure Code (8th edition) in such cases the Court is bound to award to the mortgagee interest on the principal sum from the date of suit up to the date fixed for payment of the mortgage debt at the rate stipulated in the mortgage, unless of course the rate is penal, which is not the case here.

(1) (1900) 2 Bom. L. R. 225.

(2) (1914) I. L. R. 35 All. 220.

For the foregoing reasons I would accept the appeal, set aside the decree of the lower Court, and in lieu thereof grant a preliminary decree to the plaintiff-appellant against the defendants-respondents;

(a) declaring that the amount due to the plaintiff on foot of the mortgage in suit is Rs. 2,700 (principal) together with interest and compound interest calculated at Rs. 1-4-0 *per cent. per mensem* with six monthly rests from the date of the mortgage-deed to the date of this decree;

(b) directing that if the defendants pay into Court the amount so decreed on a day within six months from the date of this decree, the plaintiff shall deliver up to the defendants all documents in his possession or power relating to the mortgaged property and shall, if so required, re-transfer the property to the defendants free from the mortgage; and

(c) in default of the defendants paying as herein above mentioned, the mortgaged property shall be sold and the proceeds of the sale shall be paid into Court and applied in payment of the amount declared due to the plaintiff as aforesaid together with subsequent interest and compound interest at Rs. 1-4-0 *per cent. per mensem* and proportionate costs in both Courts.

It is, further ordered that if for some reason the decree is not satisfied within six months from this date, simple interest subsequent to that date shall be paid at Rs. 1-4-0 *per cent. per mensem* till realization.

AGHA HAIDAR J.—I agree.

N. F. E.

Appeal accepted.

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