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back to Jail. At the same time, as half a month's imprisonment is obviously much too light a sentence, I would sentence him now to pay a fine of Rs. 100 and in default of its payment to undergo two months' rigorous imprisonment. The respondent will either pay the fine or surrender to his bail-bond before the District Magistrate.

JOHNSTONE J.

JOHNSTONE J.—I agree.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

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

ABBAS KHAN AND ANOTHER (PLAINTIFFS)

Appellants

versus

RAM DAS AND MUHAMMAD (DEFENDANTS)

Respondents.

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 May 10.

Civil Appeal No. 294 of 1923.

Mortgage—Interest—whether a charge on the mortgaged property—and whether payable after the expiry of due date—in the absence of express stipulation.

Held, that a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of a contract to the contrary.

Ganga Ram v. Natha Singh (1), followed.

Held also, that where in a mortgage deed there is a provision to pay simple or compound interest at a certain rate and the mortgage is to be redeemed within a certain period and there is no express stipulation that after the expiry of that period interest shall be paid, it is reasonable to ascribe to the parties the intention that the same rate of interest (whether simple or compound) shall be payable after the expiry of the period.

Motan Mal v. Muhammad Balkash (1), and *Mothra Dar Raja Narindar Bahadur* (2), followed.

First appeal from the preliminary decree of Lala Har Dayal, Senior Subordinate Judge, Attock, at Campbellpur, dated the 27th November 1922, granting the plaintiff possession by redemption of the land in suit on payment of Rs. 8,791-12-3, etc.

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MUHAMMAD IQBAL and C. L. GULATI, for Appellants.

M. S. BHAGAT and G. D. BHAGAT, for Respondents.

JUDGMENT.

AGHA HAIDER J.—This is a plaintiffs' appeal arising out of a suit for redemption. The trial Court has decreed the suit conditional upon the plaintiffs paying a sum of Rs. 8,791-12-3, in default whereof the suit is to be dismissed. The plaintiffs have come up to this Court in appeal.

The facts are briefly these:—One Sultan Ahmad, the predecessor-in-title of the plaintiffs, executed a mortgage on the 18th June 1906 in favour of the defendant No. 1 for a sum of Rs. 600. The mortgage deed in suit has not been printed and we are obliged to look into the vernacular document on the record. The main conditions of this document which are relevant for the purpose of deciding this appeal, are as follows:—Possession was to remain with the mortgagor and he was to pay the land revenue and appropriate the produce. It is further provided that on the mortgage money interest at the rate of Re. 1-4-0 *per cent. per mensem* shall be payable at the end of each year and, on default, interest shall be compoundable.

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at the same rate. Further, it is provided that when the mortgage money with interest and compound interest due shall be paid then the mortgagor shall be entitled to have the mortgaged property redeemed. The term of the mortgage was fixed at eight years and it was stipulated that within that period, on payment of the principal sum of money together with interest and compound interest, the mortgagor shall be entitled to redeem the property. If within that period the property is not redeemed, then on the expiry of that period, the mortgagor shall put the mortgagee in possession and the mortgagee also shall be competent to obtain possession from the mortgagor. And when the mortgagee shall have obtained possession of the mortgaged property, then whatever may be the balance (due) as regards the principal mortgage-money together with interest and compound interest, interest on the same shall be counterbalanced with the produce of the land. The document ends with the important clause that until the mortgagee obtains formal possession, interest shall continue to run as heretofore.

Nothing was paid during the first eight years of the mortgage and possession was neither given nor obtained by the parties concerned at the expiry of the period of eight years. The plaintiffs brought the present suit on the 19th of April 1921 and claimed that they were entitled to redeem the mortgage on payment of the mortgage money together with simple interest for the period expiring with the termination of the first eight years. They stated that they had paid Rs. 329-8-0 to the defendant No. 1 on various occasions on account of the mortgage. They further alleged that they had paid a sum of Rs. 500 to the mortgagees in respect of the interest on the mortgage

money. Consequently they claimed redemption of the mortgaged property on payment of Rs. 990. They also added a prayer for possession of the property although it is admitted that possession has all along been with them. Defendant No. 1 filed a written statement in which he pleaded that the sum of Rs. 500 was not paid to him but he was prepared to allow credit for the sum of Rs. 329-8-0 which he admits having received from the mortgagors. He pleaded that according to the terms of the mortgage deed he was "entitled to recover interest and compound interest on the principal sum from the date of the mortgage deed till the acquisition of the possession of the land mortgaged." He said that up to the time of the institution of the suit, the sum due to him was Rs. 7,351-4-0 which ought to be treated as a charge upon the property and on payment of which only the plaintiff could be entitled to redeem the mortgage. In paragraph 7 he stated that he was not bound under the terms of the mortgage to take possession of the land mortgaged, after the expiry of the eight years and he further claimed that he was entitled to interest and compound interest according to the terms of the document, seeing that the plaintiffs had been enjoying the produce of the land. As already stated the learned Judge of the trial Court decreed the plaintiffs' suit on payment of the sum of Rs. 8,791-12-3.

So far as the sum of Rs. 500 is concerned the evidence on the record is very flimsy and the learned Judge of the trial Court did not believe it. The learned counsel for the appellants at the very outset properly stated that he was not prepared to press his appeal with respect to this sum of Rs. 500. So far as this finding of the Court below is concerned it cannot, therefore, be disturbed.

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The learned counsel for the appellants raised three points in his arguments. At first he contended that for the period of the first eight years his clients were not liable to pay compound interest, but subsequently he had to admit in the course of his arguments that this contention could not be seriously pressed. His second contention was that after the expiry of the first eight years of the mortgage it was incumbent upon the defendant-mortgagee to take possession of the mortgaged property and since he had not done so, he could not claim any interest whatsoever for any period subsequent to the first eight years. We have considered the contents of the document and in our opinion the document does not bear the construction which the learned counsel for the appellant has sought to place upon it. We do not see any words in it which would show that it was incumbent upon the defendant to take immediate steps on the expiry of the first eight years to obtain possession of the property. On the other hand, we have the fact that the plaintiffs have remained all along in possession of the property without ever having made any offer to deliver possession to the mortgagee. Under this contention the learned counsel for the appellants, raised two subsidiary points. In the first place he urged that no interest should be charged on the amount which was due under the mortgage at the expiry of the period of eight years. His argument was based upon the contention that the amount of interest and compound interest could not technically be treated as "mortgage money" and therefore it was not a charge upon the mortgaged property. This argument cannot be accepted, in view of the leading case on the subject *Ganga Ram v. Natha Singh* (1). There, their

(1) (1924) I. L. R. 5 Lah. 425 (P.C.).

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Lordships held that a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property, in the absence of any contract to the contrary. In the present case there is no contract to the contrary which would take it out of the principle laid down in the above-noted Privy Council case.

His second point was that there was no express stipulation in the document that after the expiry of the first eight years, simple interest or compound interest should be paid, and in any case he claimed that his clients were not liable to pay compound interest. I cannot accede to this contention as I find that this point is covered by the Full Bench decision in *Motan Mal v. Muhammad Bakhsh* (1). In this connection I may also refer to the case of *Mathra Das v. Raja Narindar Bahadur* (2). The terms of the deed are given at page 46 in their Lordships' judgment and are in substance the same as those in the deed in the present case. The judgment of their Lordships on the point before us is to be found at pages 48-49 and is as follows:—

“ The covenant to pay within a year ties up the hands of the mortgagee for that year and protects the mortgagor; but it rarely happens, and is rarely contemplated, that the mortgagor should actually pay by that time. The provision for applying payments to reduction of interest points strongly to the expectation of the parties that the transaction will not be closed when the fixed day of payment arrives. The construction of the High Court ascribes to the parties an intention that, however, payment may be delayed beyond the fixed day, the debt shall carry no interest.

(1) (1922) I.L.R. 3 Lah. 200 (F.B.). (2) (1896) I.L.R. 19 All. 39 (P.C.).

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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. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, 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 common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction."

Having regard to these authorities, it is, in my opinion, not open to the appellants to challenge the finding of the Court below on this point and the mortgagee is therefore entitled to charge compound interest on the amount due at the expiry of the period of eight years.

The third contention raised by the learned counsel for the appellants is based upon the following facts:—"On the 4th October 1920 the mortgagee obtained a decree against the mortgagor for possession of the mortgaged property. After the obtaining of that decree and up to this moment it does not appear from the record that the mortgagee decreeholder took any steps whatsoever to execute the decree and to obtain possession of the property." The contention of the learned counsel for the appellants is to the effect that since the mortgagee in spite of obtaining his decree for possession of the mortgaged property has not taken any steps to obtain possession of that property, he is not entitled to any interest for the period subsequent to the 4th October 1920. There is some force in this argument and the learned counsel

for the respondent could not give any satisfactory answer to this contention except that the plaintiffs have been in possession and cannot keep back the interest and at the same time enjoy the usufruct of the property. This argument does not really meet the situation created by the defendant's sleeping over the decree which he obtained, about seven years ago.

After considering the facts and circumstances of the case I think that the mortgagee after the 4th October 1920, the date when he obtained the decree for possession, is entitled only to simple interest at the rate of Re. 1-4-0 *per cent. per mensem* on the amount which was due to him on that date, till the payment in full by the plaintiffs-mortgagors of the same. We have calculated the amount ourselves and roughly speaking it comes to Rs. 6,525. He is therefore entitled to simple interest @ Re. 1-4-0 *per cent. per mensem* on this sum from the 4th October 1920 onwards. I, therefore, allow the appeal to this extent only and order that a preliminary decree for redemption be passed in terms of Order XXXIV, rule 7 of the Code of Civil Procedure. As the appeal has succeeded only to a small extent I order that the defendant-respondent shall get his proportionate costs in both the Courts.

TEK CHAND, J.—I agree with the conclusions arrived at by my learned brother.

A. N. C.

Appeal accepted in part.

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