

APPELLATE CIVIL.

Before Addison and Abdul Rashid JJ.

PHUMMAN MAL (DEFENDANT) Appellant

versus

CHIRANJI LAL (PLAINTIFF) Respondent.

1936

June 8.

Civil Appeal No. 1904 of 1935.

Civil Procedure Code, Act V of 1908, Order XXXIV, rule 6 : Suit on a mortgage — Interest — claim to recover interest for six years prior to the institution of the suit, personally, from the mortgagor — where claim to recover the principal ' personally ' is barred by time.

Held, that in a suit on a mortgage, if the right to recover the principal ' personally ' from the mortgagor has been extinguished on account of its being barred by time, the right to recover interest thereon for six years immediately preceding the institution of the suit (' personally ' from the mortgagor) is also extinguished.

Dost Mohammad v. Miraj Din (1), relied upon.

Ralia Ram v. Hira Lal (2) and *Munshi Ram v. Puran Chand* (3), not followed.

Cheang Thye Phin v. Lam Kin Sang (4), referred to.

The case was referred to a Division Bench by Mr. Justice Jai Lal.

Second appeal from the decree of Mr. S. M. Haq, District Judge, Hissar, dated 27th May, 1935, modifying that of R. S. Lala Atma Ram, Honorary Subordinate Judge, 3rd Class, Sirsa, dated 3rd December, 1934, in so far as to direct that the mortgagor shall not be ' personally ' liable except for the interest on the mortgage due for the last six years before the institution of the suit.

V. N. SETHI, for Appellant.

NAWAL KISHORE, for Respondent.

(1) 1936 A. I. R. (Lah.) 387.

(3) 1930 A. I. R. (Lah.) 737.

(2) 1928 A. I. R. (Lah.) 653.

(4) 1929 A. I. R. (P. C.) 240.

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The order, dated 17th April, 1936, submitting the case to a Division Bench—

JAI LAL J.—The only ground on which this appeal has been admitted is ground No.5, which is that the right of the mortgagee to recover the principal amount of the mortgage from the mortgagor personally having been extinguished on account of its being barred by time there can be no right to recover interest for six years prior to the institution of the suit; in other words, if the right to recover the principal is extinguished the right to recover interest must also ordinarily be held to be extinguished, unless in the mortgage-deed itself there are conditions relating to the payment of interest independently of the liability to pay the principal. The learned District Judge has decided this question in favour of the mortgagee relying upon *Ralia Ram v. Hira Lal* (1), a judgment of a Division Bench delivered by the late Chief Justice, and upon *Munshi Ram v. Puran Chand* (2) in which a learned Judge in Chambers followed the previous case. In my opinion the matter needs reconsideration and consequently I refer this case to a Division Bench.

The judgment of the Division Bench was delivered by—

ADDISON J.—The sole question involved in this second appeal is whether when the right of the mortgagee to recover the principal amount of the mortgage from the mortgagor personally has been extinguished on account of its being barred by time, he has still a right to recover interest for six years prior to the institution of the suit personally from the mortgagor; in

(1) 1928 A. I. R. (Lah.) 653. (2) 1930 A. I. R. (Lah.) 737.

other words, whether if the right to recover the principal personally from the mortgagor is extinguished, the right to recover interest personally against the mortgagor should be held also to be extinguished. What has happened in the Courts below is that the mortgaged property was held liable while the mortgagor has been held personally liable to pay interest for six years prior to the institution of the suit, although the personal remedy to repay the principal is barred by time against the mortgagor.

This question was considered by a Division Bench of this Court in *Ralia Ram v. Hira Lal* (1). That was a suit brought to recover money secured under a mortgage from the mortgaged property as well as from the mortgagor personally, and the defendants confessed judgment. It was held that they could not, after the sale proceeds were found insufficient and the mortgagee applied for the personal remedy, be allowed to raise the issue of limitation. This was sufficient to decide the suit but the Bench went on also to hold, though *obiter*, that even when the mortgagee's claim for the principal amount was barred, the mortgagee was not debarred from recovering from the mortgagors personally the interest which accrued due during the six years immediately preceding the institution of the suit. This *obiter dictum* was followed by a learned Single Judge in *Munshi Ram v. Puran Chand* (2).

This question came before another Division Bench in *Dost Mohammad v. Miraj Din* (3), which found that interest could not be held to accrue to principal which was not legally recoverable, interest itself being essentially not an inherent right but a right which was given by law; hence where in a suit under Order 34,

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(1) 1928 A. I. R. (Lah.) 653. (2) 1930 A. I. R. (Lah.) 737.

(3) 1936 A. I. R. (Lah.) 327.

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rule 6, Civil Procedure Code, a claim for a personal decree for a principal amount was barred by time, a claim for interest during the six years preceding the institution of the suit was also barred. The learned Judges who decided this case, explained and distinguished *Ralia Ram v. Hira Lal* (1). They were of opinion that it could not be laid down broadly that interest which accrued due during the six years immediately preceding the institution of the suit was recoverable personally from the mortgagors. The learned Judges considered that *Ralia Ram v. Hira Lal* (1), was decided on its own special facts, the judgment mentioning that the personal liability for the payment of interest under the covenant contained in the instrument of mortgage arose each year until the expiry of the period for the recovery of the debt from the mortgaged property, *i.e.*, the period of 12 years. Apart, therefore, from the decision being *obiter dictum*, it cannot be held to lay down the broad principle that in all cases interest for six years immediately preceding the suit can be recovered personally from the mortgagor.

We are in agreement with great respect with the decision of the learned Judges who decided *Dost Mohammad v. Miraj Din* (2). It was held by their Lordships of the Privy Council in *Cheang Thye Phin v. Lam Kin Sang* (3) in a case from the Straits Settlements that where there was a special contract to pay interest at a specified rate, the principle that where interest was a mere accessory to the principal and a claim to the latter was barred by statute, the interest thereon could not be recovered, did not apply.

(1) 1928 A. I. R. (Lah.) 653. (2) 1936 A. I. R. (Lah.) 387.

(3) 1929 A. I. R. (P. C.) 240.

In the case before us two options were given to the mortgagee under the mortgage deed and the one he chose was to add the interest to the principal and calculate compound interest thereon. This meant that the interest each year became added to the principal and interest was payable thereon in the subsequent years. For all purposes, therefore, it became part of the principal amount. The personal remedy for the principal being barred by time, it follows that the decision of the Court below, allowing interest for six years immediately preceding the suit to be realised personally from the mortgagor, was wrong.

We accordingly accept the appeal and set aside this portion of the lower appellate Court's order. The result will be that the decretal amount will be realisable only from the mortgaged property. The appellant will have his costs in this Court.

P. S.

Appeal accepted.

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