

1894 after the first hearing. In this suit the defendant did make an appearance at the first hearing, and therefore Chapter VII would not apply, except in so far as section 157 provides that the Court may exercise a discretion in disposing of the suit as directed in Chapter VII, should the defendant fail to appear on the day to which the trial may have been adjourned. The case of *Zainulabdin Khan v. Ahmad Raza Khan* (1), decided by their Lordships of the Privy Council, points out the distinction between a case decided *ex-parte* in the absence of one of the parties at the first hearing and a case like that before us decided in the absence of a defendant on the date to which the hearing of the suit may have been adjourned. The only remedy for a defendant in such a case is, as pointed out by their Lordships, by an appeal, should an appeal lie from a decree in the suit or, it may be added, as in the present suit, where no appeal lies from a decree of the Small Cause Court of Calcutta, by an application for a new trial under section 37 of the Presidency Small Cause Court Act, 1882. I would therefore, in reply to the reference made, state that the application before the Judge under section 108 should be dismissed.

Attorney for the plaintiff : Babu Kally Nath Mitter.

Attorneys for the defendant : Messrs. Orr, Robertson and Burton.

T. A. F.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

1893
Dec. 22. BIKRAMJIT TEWARI AND ANOTHER (DEFENDANTS NOS. 4 AND 5)
v. DURGA DYAL TEWARI (PLAINTIFF) AND OTHERS (DEFENDANTS NOS. 1 TO 3).*

Interest—Interest Act XXXII of 1839—Interest on mortgage money—Transfer of Property Act (IV of 1882), s. 88—Charge on mortgaged property—Interest where none is stipulated for after due date of mortgage.

The Court has power under the Interest Act (XXXII of 1839) to give interest on mortgage money, as it is money payable at a certain time, and

* Appeal from Appellate Decree No. 727 of 1892, against the decree of J. G. Charles, Esq., District Judge of Shahabad, dated the 15th of December 1891, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that district, dated the 23rd of December 1890.

(1) I. L. R., 2 All., 67; L. R., 5 I. A., 233.

under a written instrument: and the terms of section 88 of the Transfer of Property Act make such interest recoverable or payable out of the mortgaged property. The interest on the mortgage is not necessarily only the interest which the parties stipulated by the mortgage deed should be paid, but would also include interest which under the law is payable, *e.g.*, interest after the due date of the mortgage, where there is no stipulation for interest after the due date.

THIS was a suit to recover Rs. 40,61-6 annas, being the amount due for principal and interest on two mortgage bonds, dated respectively 24th February 1882, for Rs. 649, and 18th August 1882, for Rs. 799, by which certain immoveable property was pledged for repayment of the money. In both deeds it was provided that the interest should be at the rate of Re. 1 annas 14 per cent. *per mensem*, and the date for repayment of the money was the 30th Joisto 1891 (11th June 1884). The plaintiff prayed that the amount might be realized by sale of the mortgaged properties, and also for a personal decree against the defendants.

The defendants 1 to 3, the mortgagors, did not appear. The defendants 4 and 5, who defended the suit, were subsequent mortgagees and transferees, and they raised several objections, the only one material to this report being that embodied in the first and fourth issues—(1) “Is the plaintiff entitled to any interest after due date, and if so, at what rate? (4) What is the amount due to the plaintiff, and how is it to be realized?” As to the first issue there was no express stipulation in either bond for interest after the due date of the bond. In the bond dated 18th August 1882, there was a stipulation that the mortgagees “shall not have a right to claim abatement on the interest, nor shall the *mohajim* be entitled to claim enhancement of interest either by our or his own motion, or by moving a competent Court.”

The first Court, the Subordinate Judge, on this question observed:—

“As regards the first issue, I am to say that the bonds do not expressly stipulate for payment of interest after due date. In one bond, for Rs. 799, there is a stipulation that the parties will not increase or decrease the stipulated rate, but there is no provision that this clause refers to the period after due date. It might be construed to have reference up to that date. Considering the period during which the plaintiff was silent, and also considering the stipulation for high rate of interest up to due date, and also

1893

BIKRAMJIT
TEWARI
v.
DURGA DYAL
TEWARI.

1893

BIKRAMJIT
TEWARI
v.
DUBGA DYAL
TEWARI.

taking into consideration the want of express stipulation for interest afterwards, I cannot allow to plaintiff the stipulated rate of interest after due date to date of suit. There is also no stipulation of interest after due date in the other bond. Consequently I allow interest at 6 per cent. per annum after such date, as fair measure of damages for defendants' non-payment of the money on that date. The first issue is found for the defendants."

The Subordinate Judge made a decree for the amount due on the bonds with interest at 6 per cent. per annum, the amount to be realized from the mortgaged properties in case the money was not paid within six months; also for a general decree if any amount remained unsatisfied by sale of the properties.

On appeal the Judge said :—

"I concur with the opinion of the Subordinate Judge that neither of the bonds relied on by the plaintiff stipulate for interest after due date, so that allowing interest is in the discretion of the Court. Considering that the plaintiff did not bring this suit till some six or seven years after due date, I think the Subordinate Judge exercised a wise discretion in allowing only 6 per cent. per annum as the rate of interest after due date."

The appeal on this point being dismissed, the defendants appealed to the High Court, on the grounds (*inter alia*) that the Courts below were wrong in allowing interest after due date, inasmuch as there was no stipulation in the bonds for payment of interest after due date; that the Courts below should not have awarded interest at six per cent., as a fair measure of damages for non-payment of the money on that date, inasmuch as the plaintiff's claim for such interest or damages was barred by limitation; and that such compensation or damages in lieu of interest should not have been made a charge on the lands in dispute.

Moulvie *Mahomed Yusoof* and Babu *Jagat Chandra Banerjee* for the appellants.

Babu *Abinash Chandra Banerjee* for the respondents.

The cases of *Juala Prasad v. Khuman Singh* (1), *Gobind Prasad v. Chandar Sekhar* (2), *Gudri Koer v. Bhoobaneswari Coomar Singh* (3), and *Golam Abas v. Mahomed Jaffer* (4), were cited in the course of argument.

(1) I. L. R., 2 All., 617.

(3) I. L. R., 19 Calc., 19.

(2) I. L. R., 8 All., 486.

(4) I. L. R., 19 Calc., 23, note.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.), so far as it was material to this report, was as follows:—

1893

BEKRAMJI
TEWARI
v.
DURGA DIAL
TEWARI.

The second point is a question of interest. The appellants are the assignees of the mortgagors, and they complain that the interest from the due date of the bond up to the date of suit has been charged on the property. They say that, inasmuch as under the terms of the bond no such interest is payable, it can only be treated as damages, and cannot be charged on the property, and we have been referred to two judgments of the Allahabad High Court (1), in which, relying upon certain English decisions, what is called damages are given in respect of the loss after the time when the money was stipulated to be paid. It really seems to us that it makes very little difference what we call it. In the ordinary acceptation of the term, money of this class is generally known as interest. But apart from other questions, we feel a difficulty in making any use of the Allahabad decisions, because it does not appear that the Interest Act was in the contemplation of the learned Judges who gave those decisions. The Interest Act is not mentioned by them, and as happens, we are sorry to say, very frequently in reports of cases tried in Indian Courts, there is no reference at all to the arguments of pleaders or other legal representatives of the parties, and no statement of the statutes or cases cited. We have frequently had to point out that, in the absence of a detail of the arguments and of the Acts cited in respect of a decision, that decision is of very much less value than it would otherwise be. In our opinion, under the Interest Act, which is Act XXXII of 1839, the Court has power to give interest upon mortgage money, as it is money payable at a certain time and under a written instrument. That Act, as we have said, was not referred to in either of the judgments in the Allahabad cases; and there being that power in the Court under that Act to give interest upon mortgage money, we think that the terms of section 88 of the Transfer of Property Act make the interest recoverable or payable out of the property. That section says:—"In a suit for sale if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section 86," that is

(1) I L. R., 2 All., 617, and I. L. R., 8 All., 486.

1893
 BIKRAMJI
 TEWARI
 2.
 DURGA DYAL
 TEWARI.

to say, "ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to." We think the interest on the mortgage is not necessarily only the interest which the parties by the mortgage stipulated should be paid, but would also include interest which under the law is payable. The words are wide enough to bear such a construction, and in our opinion it is reasonable, and as far as we know it has been the practice of the Courts to allow in the account taken under a mortgage a reasonable rate of interest after the time stipulated for payment until the date of the final order for sale. At any rate, whether it has been the practice of the Courts or not, the construction of the section which the learned District Judge has accepted and acted upon is in our opinion reasonable.

We are obliged to the learned pleader for the appellants for citing to us a recent decision of this Court in *Gudri Koer v. Bhoobaneswari Coomar Singh* (1), and also another case of this Court, *Gulam Abas v. Mahomed Jaffer* (2). In the first place we find the learned Judges have expressly, at page 24 of volume 19, I. L. R., Calcutta Series, declined to decide the question which we are now deciding; and in the *second place*, the only question in those cases was the question of limitation—a question which is entirely different from that which is now before us. In our opinion, in this case the interest is recoverable from the property in the same way as the mortgage money and the costs of the suit, as well as the interest which the law allows to be charged; and therefore we hold that the lower Appellate Court is right.

The third question was barely argued by the learned pleader. It was with reference to the power of the mortgagor to mortgage the property. As his clients were the assignees of the mortgagor, we do not see how he could have argued it on their behalf.

The result is that the appeal must be dismissed with costs.

Appeal dismissed.

J. V. W.

(1) I. L. R., 19 Cal., 19.

(2) I. L. R., 19 Cal., 23, note.