

APPELLATE CIVIL.

1913

Jan. 3.

Before Holmwood and Chapman J.,

MAKBUL ALI

v.

ALI AHMAD.*

Interest—Usufructuary mortgage—Interest not stipulated for—Charge in the nature of mortgage must be in writing and registered.

Where no interest is stipulated for in a mortgage bond no interest is recoverable. A charge in the nature of mortgage, whether for principal or interest, must be expressed in writing and registered, and cannot be raised by implication.

Kuttiumma v. Madhava Menon (1) followed.

Imdad Hasan Khan v. Badri Prasad (2) distinguished.

SECOND APPEAL by Makbul Ali, the defendant.

This appeal arose out of a redemption suit. The plaintiffs alleged that the disputed land belonged to their uncle, one Rakinuddin, who mortgaged it to the defendant No. I by a usufructuary mortgage bond dated 17th Magh, 1260, and that the defendant No. I was still in possession of the land; that Rakinuddin was dead; that the plaintiffs were his only heirs and that in spite of repeated requests to receive the mortgage money the defendant No. I had refused to accept the money.

Defendant No. I contended that Manirullah was not the next friend of the minor plaintiffs; that the plaintiffs had no right to the land in dispute; that it

* Appeal from Appellate Decree, No. 170 of 1911, against the decree of Rajani Kanta Chatterjee, Additional Subordinate Judge of Chittagong dated Nov. 8, 1910, modifying the decree of Kunja Behari Ghosh, Munsif of Patiya, dated June 22, 1910.

(1) (1901) 11 Mad. L. J. 186.

(2) (1898) I. L. R. 20 All. 401.

was sold for the debt of their predecessor, and one Sachiram had purchased it in the auction sale; that the boundaries were incorrect; that he never possessed the mortgaged land but Rakimuddin had kept it in his possession by executing a kabuliyat in 1260 M.E.; that he did not get any profit since 1264 M. E. and that without paying Rs. 56 as profits from 1264 to 1271 the plaintiffs could not redeem; and that Manirullah could not be the next friend of the minor plaintiffs.

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Sachiram was subsequently made a defendant and he disclaimed his right to the land in suit. He submitted that he made the auction purchase with the minors' money and for their benefit.

The learned Munsif, who tried the case, held that the plaintiffs were entitled to redeem the mortgaged land on payment of Rs. 42 and he accordingly decreed the suit with costs against defendant No. I.

The defendant No. I then appealed to the Additional Subordinate Judge of Chittagong who dismissed the appeal.

Against that order of the Additional Subordinate Judge the defendant preferred this second appeal.

Babu Dharendra Lal Kastgir, for the appellant.

Babu Prabodh Kumar Das, for the respondent.

HOLMWOOD AND CHAPMAN JJ. This second appeal arises out of a suit for redemption brought by the mortgagor plaintiff against the mortgagee defendant. The plaintiff mortgaged his property by way of usufructuary mortgage to the defendant, and a month afterwards obtained a lease from him for one year at the rental of 8 rupees a year. There was no stipulation in the usufructuary mortgage bond for any interest; and although the lease recites that there had been a mortgage there is no charge made on the property by

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the lease for the rent annually due upon it. The Courts below have, therefore, found that the redemption may be had on payment of the principal only, and have allowed no interest.

The defendant appeals on the ground that the plaintiff is not entitled to redeem without payment of principal and interest. He argues this point in three ways: *first*, he maintains that the decree should be one for account; *secondly*, that on a construction of both the documents the transaction was a single one and the plaintiff is bound to pay interest at the rate set out as rental in the lease; and, *thirdly*, that in any case a Court of equity should give the defendant some usufruct or interest in the circumstances of this case. The ruling in *Imdad Hasan Khan v. Badri Prasad* (1) is relied upon, as it was relied upon before the learned Subordinate Judge, and the ruling in *Kuljyan Dass v. Sheo Nandun Purshad Singh* (2) is also cited before us as authority that an account should be taken.

The learned Subordinate Judge has distinguished the Allahabad case from this case, and we think rightly. In that case the two documents referred to each other and there was a clear stipulation that the rent in the lease should be taken as interest upon the mortgage. In this case there is no such express reference and no such stipulation and the case seems to us to be precisely on all fours in this respect with the case of *Kuttiummi v. Madhava Menon* (3). Two very important principles of law which govern this case were laid down in that case by Shephard and Boddam JJ. The first is that where no interest is stipulated for in a mortgage bond no interest is recoverable. The second is that a charge in the nature

(1) (1898) I. L. R. 20 All. 401.

(2) (1872) 18 W. R. 65.

(3) (1901) 11 Mad. L. J. 186.

of mortgage whether for principal or interest must be expressed in writing and registered and cannot be raised by implication. In that case the usufructuary mortgagee leased the mortgage lands to the mortgagor for one year, and a registered deed executed by the mortgagor made a charge upon the land for arrears of rent, which makes the Madras case a much stronger case than this, and the mortgagee paid no rent but held over after the lapse of the period; it was however held that the rent was not recoverable as interest due on the mortgage. It is true that this was a suit by the mortgagee for the mortgage money and for arrears of rent, and in the issue the Courts gave the plaintiff a decree for three years' rent which was not barred by limitation. But it is impossible for us even though we may hold that the defendant is equitably entitled to such rent to give it to him in this suit. He must bring a suit properly framed for the purpose, in order to have it determined what rent, if any, he can recover under the terms of the lease. It is clear that he cannot recover any rent as interest on the mortgage and that he is subject to the ordinary rules of limitation as regards the amount of rent recoverable. It could not therefore be within the scope of this proceeding to order an account to be taken and the equities between the parties decided.

For these reasons, we think that the appeal fails and must be dismissed with costs.

S. K. B.

Appeal dismissed.

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