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SOLI PESTONJI MAJOO & ORS.

v.

GANGADHAR KHEMKA

December 6, 1968

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[J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.]

Practice and Procedure—Mortgage—Suit by first mortgagee—Puisne mortgagee a party—Decree passed but no sale—Prior mortgagee paid off by mortgagor—Suit by puisne mortgagee on his mortgage—Prayer for decree in Form 5A Appendix D, C.P.C.—If suit maintainable.

C

Code of Civil Procedure (Act 5 of 1908), O. 34, r. 11—Interest subsequent to date of suit—Contractual rate if should be decreed.

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The owner of a property executed three mortgages in favour of three persons on three different dates. The first mortgagee filed a suit to which he made the two puisne mortgagees also parties. A decree was passed against the mortgagor in Form 9, Appendix 'D', Civil Procedure Code, 1908. As the mortgagor did not pay the amount, a final decree for sale of the mortgaged property was passed. The mortgagor, however, paid off the decretal amount due to the first mortgagee and the property was not brought to sale. Thereafter, the second puisne mortgagee brought a suit on his mortgage and prayed for a mortgage decree in Form 5-A. It was contended on behalf of the mortgagor, that the puisne mortgagee was not entitled to file the suit and the only course open to him was to apply for a decree for sale and realise his dues from the surplus sale proceeds of the mortgaged property. The suit was decreed by the trial judge and in appeal, the Appellate Bench of the High Court varied the decree by reducing the amount declared due. The decree however granted interest at the contractual rate of 12% per annum with monthly rests even after the date of suit.

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In appeal to this Court,

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On the questions (1) whether, in the circumstances, the puisne mortgagee was entitled to institute a separate suit in respect of his mortgage; and (2) whether interest on the amount adjudged should be at the contractual rate even after the date of suit.

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HELD : (1) Under the Transfer of Property Act, 1882, and O. 34 of the Code of Civil Procedure, 1908, a puisne mortgagee is made a party to the suit by the first mortgagee in order that the puisne mortgagee might have an opportunity of redeeming if he wished, and in order that he might receive his mortgage money, or part of it, out of the surplus sale-proceeds after satisfaction of the first mortgage. But the decree is not really in his favour and he cannot insist upon a sale nor get a personal decree in his favour if the first mortgagee is satisfied by the mortgagor before the sale. Therefore, the puisne mortgagee was entitled to file the suit on his mortgage. [37 D—E]

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Chandra Roy Chowdhry v. M. M. Nahapet, I.L.R. 37 Cal. 907, Vedavyasa Ayyar v. The Madura Hindu Labha Nidhi Co. Ltd I.L.R. 42 Mad. 90 and Shiv Kumar Prosad v. The Trustees for the Improvement of Calcutta, 51 C.W.N. 798, approved

(2) Under O. 34 r. 11 Civil Procedure Code, 1908, (inserted by Act 21 of 1928), the Court may order payment of interest to the mortgagee upto the date fixed for payment at the rate payable on the principal. Hence, the Court has discretion not to decree the contractual rate so far as interest *pendente lite* and subsequent interest up to date of redemption is concerned, even if the rate was not penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. In the circumstances of the present case simple interest at 6% per annum on the principal sum adjudged from date of suit till date of redemption is appropriate. [39 C—F]

Jaigobind Singh v. Lachmi Narain Ram, [1940] F.C.R. 61; A.I.R. 1940 F.C. 20, applied.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 24 of 1966.

Appeal by special leave from the judgment and decree dated January 17, 1962 of the Calcutta High Court in Appeal No. 82 of 1959.

Rameshwar Nath and *Mahinder Narain*, for the appellant.

J. P. Mitter, *Sardar Bahadur*, *Vishnu Bahadur* and *Youngindra Khushalani*, for the respondent.

The Judgment of the Court was delivered by

Ramaswami, J. The appellant is the executor of the estate of Pestonji Sorabji Majoo deceased, hereinafter referred to as the 'mortgagor'. During his lifetime the mortgagor was the owner of one-third share in premises no. 50, Chittaranjan Avenue, Calcutta. On November 21, 1938, the mortgagor executed a deed of mortgage in respect of his one-third share in favour of Shew Balak Pandey for Rs. 7,500. On December 3, 1945 he executed another deed of mortgage in respect of his one-third share in favour of one Sudhinder Nath Mitter for Rs. 8,350. On May 6, 1947, he executed the third deed of mortgage in respect of his one-third share of the premises in favour of the respondent Gangadhar Khemka for Rs. 12,000 carrying interest at the rate of 12 per cent per annum with *monthly rests*. On January 13, 1948 Shew Balak Pandey filed a suit on his mortgage, being Suit no. 135 of 1948, impleading the puisne mortgagees as parties to the suit. On December 12, 1949, a preliminary mortgage decree in Form 9 of Appendix 'D' in the First Schedule to the Code of Civil Procedure was passed in the said suit. Since the mortgagor did not pay, a final decree was passed on December 4, 1952 in the suit. The decree directed that the mortgaged property should be sold. It contained a further direction for the disbursement of the sale proceeds and it was stated that if any balance was left after payment of the amounts due to Pandey and Mitter, "that shall be applied in payment of the amount payable to the defendant Ganga Dhar Khemka under the aforesaid preli-

- A minary decree and in payment of any amount which may be adjudged due to the said defendant Ganga Dhar Khemka for such costs of the suit". On July 4, 1954, the mortgagor, without having the property put to sale paid off the decretal dues of Pandey. On August 5, 1955, the respondent filed the suit out of which this appeal arises, being Suit no. 2218 of 1955 jointly
- B against the appellant and his mother Mrs. Majoo for a mortgage decree in Form 5-A. The appellant and Mrs. Majoo filed a joint written statement. The suit ultimately came for hearing before Law, J. on June 2, 1958. Several issues were raised in the suit and Law, J. decreed the suit and passed a preliminary decree in Form 5-A of Appendix 'D' in the First Schedule to the Code of
- C Civil Procedure and declared that a sum of Rs. 41,172/6/- was due to the respondent on June 2, 1958. The appellant and Mrs. Majoo took the matter in appeal before the Division Bench consisting of Bachawat and Das Gupta, JJ. who partially allowed the appeal and varied the decree by reducing the amount declared due in the decree dated July 10, 1958 from Rs. 41,172/6/- to Rs. 38,207.
- D This appeal is brought, by special leave, from the judgment of the Division Bench of the Calcutta High Court dated January 17, 1962.
- The first question presented for determination in this appeal is whether a puisne mortgagee in respect of whose mortgage a decree has already been made in a prior mortgagee's suit to which
- E he is made a party, is entitled to institute a separate suit in respect of his mortgage and ask for a decree in Form 5-A when the claim of the prior mortgagee made in the prior mortgagee's suit has been satisfied by payments made by the mortgagor-defendant and as a result thereof no sale takes place in the suit. It was argued on behalf of the appellant that the respondent was
- F not entitled to file the suit because of the preliminary decree passed in Suit no. 135 of 1948 in which he as a puisne mortgagee was made a party-defendant and the only course open to him as such puisne mortgagee was to apply for a final decree for sale and thereby realise his dues from the surplus sale proceeds of the mortgaged property. It was submitted that the appellant was not entitled in the circumstances to bring a fresh suit on his mortgage.
- G We are unable to accept this argument. Clause 5 of the decree in Form 9 clearly states that "if the defendant no. 2 (puisne mortgagee) pays into Court to the credit of the suit the amount adjudged due to the plaintiff (prior mortgagee) but the defendant no. 1 (mortgagor) makes default in the payment of the said amount, then the defendant no. 2 (puisne mortgagee) shall be
- H at liberty to apply to the Court to keep the plaintiff's (prior mortgagee's) mortgage alive for his benefit and to apply for a final decree." In other words, if the puisne mortgagee redeems the prior mortgage then he can step into the shoes of the prior

mortgagee and apply for final decree. The puisne mortgagee cannot apply for the sale unless he pays off the prior mortgage. It is manifest that the puisne mortgagee is added as a defendant in a suit of this description only with the purpose of redeeming the prior mortgage, if he wished and proving his mortgage and having the accounts taken. Such account of the puisne mortgagee is taken because if there is any surplus sale proceeds after meeting the prior mortgagee-plaintiff's claim, he can participate in such surplus sale proceeds as may be available for the satisfaction of the claim of the puisne mortgagee. Essentially therefore the rights of puisne mortgagee-defendant in a prior mortgagee's suit are, first, the right to redeem the prior mortgage, and, secondly, the right to participate in the surplus sale proceeds. This view is borne out by the decision of the Madras High Court in *Vedavyasa Ayyar v. The Madura Hindu Labha Nidhi Co. Ltd.*⁽¹⁾ in which it was held that the rights of the subsequent mortgagees are contingent on the property being brought to sale for non-payment of the sum due to the plaintiff-mortgagee and a decree drawn up in Form 7 of Appendix D of the Code of Civil Procedure cannot be read as a decree directing the mortgagor to redeem each of the puisne encumbrances within the time limited for redeeming the first mortgagee. It was accordingly held that the puisne mortgagee was not entitled to execute the decree for the amount due to him when no sale was held for the realisation of the amount due to the prior mortgagee and the remedy of the puisne mortgagee was a suit for sale and s. 47, Civil Procedure Code was no bar to the suit. The same view has been taken in *Shiv Kumar Prosad v. The Trustees for the Improvement of Calcutta*⁽²⁾ in which Chakravarti, J observed at page 802 as follows :

"It is true that he (puisne mortgagee) gets a free adjudication of his rights but the only practical relief which the decree gives him is that he is declared entitled to obtain satisfaction of his dues out of the surplus sale proceeds if any be left after satisfying the plaintiff's dues (*see* Form no. 9). The puisne mortgagee cannot apply for a final decree unless he himself pays off the prior mortgagee and the right to apply for a sale arises only if the plaintiff's dues are not paid but not if the puisne mortgagee's dues are not."

The learned Judge proceeded to observe :

"When he is impleaded as a defendant in a prior mortgagee's suit he is brought before the Court whether he wishes to come or not and his rights are adjudicated on by the Court under the compulsion of Order 34 Rule 4(5)."

(1) I.L.R. 42 Mad. 90.

(2) 51 C.W.N. 798.

A Some uncertainty in this branch of law has been caused by the English practice as mentioned in *Platt v. Mendel*,⁽¹⁾ and Daniel's Chancery Practice. But having regard to the provisions of the Transfer of Property Act and the present Civil Procedure Code the Indian practice is quite different. The distinction has been pointed out by Pugh, J. in *Sarat Chandra Roy Chowdhry v. M. N. Nahapiet*.⁽²⁾

B It was observed by the learned Judge that prior to the Code of Civil Procedure, 1908 there was a recognised practice on the original side of the Calcutta High Court to treat the preliminary mortgage decree as being in favour not only of the first mortgagee, but also in favour of the second mortgagee.— (See the decision of Sale, J. in *Kissory Mohun Roy v. Kally Churn Ghose*⁽³⁾ and in *Kissory Mohun Roy v. Kally Churn Ghose*⁽³⁾).

C But in a later case, in the matter of *Kissory Mohan Roy v. Kally Charan Ghose*,⁽⁴⁾ Sale, J. allowed a second mortgagee, who was a defendant, under the liberty retained to him by the preliminary decree, to come in and obtain an order for sale of the property outside Calcutta, which was subject only to the second mortgage, not to the first. This practice of treating the suit as one for the benefit of the second mortgagee was based on the English practice as it appears from the case of *Platt v. Mendel*⁽¹⁾. But under the Transfer of Property Act the proper procedure is different and the effect of incorporation of the relevant sections in the Transfer of Property Act under O. 34 of the new Code of Civil Procedure was to put an end to any independent practice on the original side of the Calcutta High Court based on the old procedure.

E The legal position therefore is that the second mortgagee is merely made a party to the suit in order that he might have an opportunity of redeeming if he wished, and in order that he might receive his mortgage money, or part of it, out of the surplus sale-proceeds after satisfaction of the first mortgage, but the decree was not really a decree in his favour, and he could not insist upon a sale nor get a personal decree in his favour if the first mortgagee was satisfied by the mortgagor before the sale. We accordingly reject the argument of the appellants on this aspect of the case.

G We pass on to consider the second contention raised on behalf of the appellants, namely, that even if the respondent is entitled to institute a second mortgage suit the High Court ought not to have granted interest to the respondent at the rate of 12 per cent p.a. with *monthly rests* even after the date of the suit and the maximum interest which should have been allowed was not more than 6 per cent p.a. simple on the principal sum adjudged. In our opinion this argument is well-founded and there was no justifi-

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(1) [1884] 27 Ch. D. 246.

(3) I.L.R. 22 Cal. 100.

(2) I.L.R. 37 Cal. 907.

(4) I.C.W.N. 106.

cation for the High Court to allow interest at the contractual rate from the date of the suit on the amount adjudged. Prior to 1929 the legal position was that under s. 34 of the Civil Procedure Code in granting a decree for payment of money the Court had full discretion to order interest at such rate as it deemed reasonable to be paid on the principal sum adjudged from the date of the suit onwards. But O.34. rr.2 and 4 which applied to a mortgage suit, enjoined the Court to order an account to be taken of what was due to the plaintiff at the date of such decree for principal and "interest on the mortgage". The special provision in O.34 had therefore to be applied in preference to the general provision in s. 34. Till the period for redemption expired therefore the matter was considered to remain in the domain of contract and interest had to be paid at the rate and with the *resis* specified in the contract of mortgage but after the period for redemption had expired the matter passed from the domain of contract to that of judgment. The right of the mortgagee would henceforth depend not on the contents of his bond but on the directions of the decree.—(See the decision in *Jagannath Prosad Singh Chowdhury v. Surajmul Jalal*.⁽¹⁾ By Act 21 of 1929, O.34 of Civil Procedure Code was amended and a new r. 11 was inserted which deals specially with interest and which states :

"11. In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely :

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage—at the rate payable on the principal or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money—at the rate agreed between the parties, or, failing such rate (at the same rate as is payable on the principal, or failing both such rates; at nine per cent per annum), and

(1) A.I.R. 1927 P.C. 1.

A (b) subsequent interest up to the date of realisation or actual payment at such rate as the Court deems reasonable—

B (i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause; and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10."

C This rule was further amended by the Code of Civil Procedure Amendment Act, 1956 but we are not concerned with this further amendment in the present case. It is apparent that the new rule 11 as inserted by the Amending Act 21 of 1929 provides that the Court "may" order payment of interest to the mortgagee upto the date fixed for payment at the rate payable on the principal. It was held by the Federal Court in *Jaigobind Singh v. Lachmi Narain Ram*⁽¹⁾ that the language of the rule gives a certain amount of discretion to the Court so far as interest *pendente lite* and subsequent interest is concerned and it was no longer absolutely obligatory on the Courts to decree interest at the contractual rates upto the date of redemption in all circumstances even if there is no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. In view of the principle laid down by the Federal Court in this decision we are of opinion that in the circumstances of the present case the respondent should be granted interest on the principal sum due at the contractual rate till the date of the suit and simple interest at 6 per cent p.a. on the principal sum adjudged from the date of the suit till the date of the preliminary decree and also at the same rate till the date of realisation.

G We accordingly allow this appeal to the extent indicated above and modify the decree of the Calcutta High Court. The plaintiff-respondent will be awarded costs proportionate to his success in the present suit as between attorney and client. He is not entitled to the costs he has incurred in the previous suit *i.e.*, suit no. 135 of 1948 in which he was made a party. The order of the High Court with regard to costs is also modified to this extent. There will be no order as to costs of this appeal.

V.P.S.

Appeal allowed.

(1) [1940] F.C.R. 61, A.I.R. 1940 F.C. 20.