

(1924) 04 MAD CK 0008
In the Madras High Court

Agnes Isabella Campbell and Another	APPELLANT
Vs	
C. Audikesavula Nayudu and Others	RESPONDENT

Date of Decision : 02-04-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 58(e), 76

Citation : AIR 1924 Mad 736 : (1924) 20 LW 153

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Division Bench

Judgement

Kumaraswami Sastri, J.—The plaintiffs sued to redeem the property mentioned in the plaint, which was mortgaged on the 17th July, 1874,

to secure the sum of Rs. 8,450 with interest at 12 p.c. per annum. The mortgagee was in possession of the property. A decree was passed on the

2nd of March, 1922 declaring that the plaintiffs are entitled to redeem the mortgage and directing accounts to be taken of the amount due to the

defendants for principal and interest, of the rents and profits of the mortgaged property, of the sums paid for rates, taxes and other public charges,

of the sums paid by the defendants for the due management of the property and of the sums paid for necessary repairs. The matter was referred to

the Official Referee who has submitted a report. Objections have been taken by the plaintiffs; but the defendants have filed no objections. The

objections pressed before me are that, as there was no provision for payment of interest after July 1879, the Official Referee was wrong in giving

post diem interest, at the bond rate, and the defendants are only entitled to interest by way of damages, at 6 per cent, for six years, and that in

stead of applying the income received by the mortgagee, first in reduction of public charge?, repairs and then of the interest payable, the Official

Referee has taken an account of each year, adding up the total charges and the interest etc., deducting from the amount so arrived at, the income

for the year, leaving a balance against the mortgagors and has allowed upon that balance 12 per cent, per annum. This is in effect giving compound

interest.

2. The first objection relates to post diem interest and this turns upon the terms of the mortgage. The deed of mortgage recites that the mortgagors

grant and convey the property specified in the mortgage to the mortgagee, ""to have and to hold the said premises unto and to the use of the

mortgagee,"" his heirs and assigns subject to the following proviso:

provided always that if the said John William Coxe, B.W. Coxe, J.H. Coxe, T.P. Coxe and Agnes Isabella Coxe, their heirs, executors"

administrators, representatives or assigns shall pay unto the said Canckoo Iyaloo Naidu his executors, administrators, representatives or assigns

the sum of Rs. 8,450 on or before the 1st day of July, 1879, together with interest for the same in the meantime after the rate of 12 per cent, per

annum. Without any deduction, then the said Canckoo Iyaloo Naidu, his heirs or assigns, will, upon the request and at the cost of the said John

William Coxe...their, or any of their heirs, executors, administrators, representatives or assigns re-convey the hereditaments, hereby granted to the

use of the said John William Coxe...their, or any of their heirs and assigns or as they, or he shall direct; but if default shall be made in payment of

the said sum of Rs. 8,450, or the interest thereon in the manner aforesaid, or any part thereof respectively, on the 1st day of July 1879, it shall be

lawful for the said Canckoo Iyaloo Naidu, his heirs, executors, administrators, representatives, or assigns, without any further consent, on the part

of the said John William Coxe...their, or any or either of their heirs, or assigns, to sell the hereditaments, hereby granted together or in parcels and

either by public auction or private contract with power upon any such sale to make any stipulations as to title or evidence of title, or otherwise,

which the said Canckoo Iyaloo Naidu, his heirs, executors, or assigns shall deem proper and also with full power to buy in, or rescind, any

contract for sale of the said premises and to resell the same, without being responsible for any loss occasioned thereby.

3. The deed goes on to provide that the mortgagee, his executors administrators

representatives, or assigns:

shall hold the monies to arise from any such sale upon trust in the first place there-out or to reimburse himself, or themselves, or pay and discharge

all the costs and expenses attending, incurred in or about such sale or otherwise in respect of the premises and in the next place to apply such

monies in or towards satisfaction of all and singular the monies for the time being, owing on the security of these presents and to pay the surplus (if

any) of the said premises unto the said John William Coxe, E.W. Coxe, J.H. Coxe, T.P. Coxe and Agnes Isabella Coxe, their or any or either of

their executors, administrators, representatives, or assigns.

4. The deed goes on to state that the mortgagors will pay the mortgagee the sum of Rs. 8450 together with interest for the same in the meantime,

after the rate of 12 per cent. per annum on the 1st day of July, 1879, without any deduction.

5. The deed is thus a deed of English mortgage falling within the definition of Section 58(e) of the Transfer of Property Act, which runs as follows:

Where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgage property absolutely to the

mortgagee but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is

called an English mortgage.

6. In cases of English mortgage, the Article of the Limitation Act, which is applicable to suits on the mortgage is Article 147, which runs as follows:

By a mortgagee for foreclosure or sale--60 years--when the money secured by the mortgage becomes due.

7. The period of limitation prescribed, under Article 148, which relates to suits against mortgagees to redeem, or to recover possession of

Immovable property mortgaged is also 60 years. Article 132 which applies to mortgages other than English mortgages provides for period of 12

years.

8. If therefore, the mortgagee's heirs filed a suit against the mortgagor's heirs for the sale of the property, 60 years would be the period of

limitation and not 12 years, under Article 132. There is therefore, no force in the contention of the vakil for the plaintiffs that assuming that post

diem interest can be granted and it is a charge on the property, interest cannot

be given, for more than 12 years, as the remedies on the mortgage would become barred by that date under Article 172.

9. The contention of the vakil for the plaintiffs is that the mortgage money was repayable on the 1st of July 1879, that in default, the remedy given

to mortgagee is to sell the property, by public auction or private contract, that the preamble to the mortgage shows that there was a previous

mortgage which gave the right of sale and the mortgagee was going to exercise that right, that the mortgage in question was executed inter alia to

prevent the sale, that part of the consideration was the giving up of the right to bring the property to immediate sale by the mortgagee, that the

power of sale is not an ordinary incident, attached to every mortgage, but an extra power conferred and that where such a power is conferred, it

must be taken that the parties provided a remedy to be enforced at once, if the mortgage money be not paid. He referred to *Chajmal Das v. Brij*

Bhukan Lal [1895] 17 All. 511, *Mathura Das v. Raja Narain Bahadur* [1897] 19 All. 39 *Bindesri Naik v. Ganga Saran Sahu* [1898] 20 All. 171

and *Badi Bibi Sahiba v. Sami Pillai* [1895] 18 Mad. 257. It is argued that there is no presumption that post diem interest is to be paid in all cases,

that where from the express terms of the document it is clear post diem interest is not payable, it cannot be granted by the Court except by way of

damages for breach of contract to pay which damages could not form a charge on the property and would be subject to the usual Rule of limitation

applicable to suits for damages and that it is only when the document is not clear and two views are possible, Courts can follow the rule, which

gives the lender interest on his money.

10. The contention for the defendants is that where a person promises to pay on a certain date and fails to do so, there is a presumption that the

parties intended that interest which was payable till that date should continue to run till payment, that where a power of sale is given a mortgagee

exercising it after the date of default would be entitled to retain in his hands interest, up till that date, even though his remedy by way of a suit on the

mortgage may be barred, that the mortgagor who seeks to redeem cannot be in a better position, that so far as limitation is concerned, post diem

interest, whether given as interest or damages, should be paid until at least the right to sue on the mortgage is barred and that in the present case

the mortgagee is entitled to post diem interest, as allowed by the Official Referee and reference has been made to Ghantayya v. Papayya [1910]

23 Mad. 534, Moti Singh v. Ramohari Singh [1897] 24 Cal. 699, Daudbhai Rambhai v. Daudbai Allibhai [1890] 14 Bom. 113, Motan Mal v.

Muhammad Bakhsh 19225 Lah. 254 and Dingle v. Coppen [1899] 1 Ch. 726 and Fisher on Mortgages Chapter IV.

11. So far as post diem interest is concerned, though there is a conflict of authority, as regards the earlier Madras cases, I think the later decisions

lean in favour of granting post diem interest, unless the terms of the document show that it was the intention of the parties that no interest should be

paid subsequent to the date when the mortgage money falls due.

12. In Chajmul Das v. Brij Bhukan Lal [1895] 17 All. 511, their Lordships of the Privy Council were not prepared to dissent from the view of

High Court that post diem interest was not payable, in respect of the mortgage sued on and that damages could be awarded ""at the rate which

could prima facie be the same as that provided by the bond during the two years, although there is no Rule of law making the rate necessarily the

measure of damages.

13. In Mathura Das v. Raja Narain Bahadur [1897] 19 All. 39 the deed of mortgage dated the 17th of January 1880 provided for payment of the

principal within one year, with interest at Rs. 0-1-6 per mensem. The borrower agreed that he would not transfer the mortgaged property, until

payment of both the principal and interest and that the amount paid should be first credited to the payment of interest and the balance, after that,

should go to reduce the principal. A suit was filed in 1891. The defendant contended that interest was not payable after the expiry of one year and

that in any event such interest was not chargeable on the property and could not be claimed for more than six years, for breach of promise to pay.

The Subordinate Judge awarded only one year's interest and held that the claim for interest, by way of damages for breach of promise to pay

would be barred within six years. The Allahabad High Court affirmed this decree. On appeal, their Lordships of the Privy Council reversed the

decree of the High Court and held that the mortgagee was entitled to post diem interest, at the bond rate and observed:

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, 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.

14. They were of opinion that in the contract sued on, the words "the amount" in the Clause "that if the mortgagor fails, the mortgagee may proceed to realise the amount, obviously meant the amount of principal and interest up to the time of realisation.

15. In *Bindesri Naik v. Ganga Saran Sahu* [1898] 20 All. 171, the suit was on two deeds of mortgage. The first provided for the repayment of the debt in two years, with interest at Rs. 1-8-0 a month and the second provided that the debt should be repaid, on the day when the first loan would become due and at same rate of interest. Both the mortgages were by conditional sale. The High Court held that post diem interest was not payable under the terms of the documents; but their Lordships of the Privy Council were of opinion that the clause, that in default of punctual payment, at the end of each year, the mortgagees were to be at liberty to treat the unpaid interest as principal and to recover it from the mortgaged property, showed that the parties contemplated post diem interest, as being chargeable. Both these cases proceeded on the construction of a particular document and I can find no general Rule enunciated, which would apply to all cases of post diem interest.

16. In *Badi Bibi Sahibai v. Sami Pillai* [1895] 18 Mad. 257, the deed of mortgage was executed in 1875. Interest was to run, at 7 per cent, per annum, and the sum was payable on the 30th of October, 1875. It was held by Muthusami Aiyar and Best, JJ., relying upon *Cook v. Fowler* [1874] 7 H.L. 27, *Gudri Koer v. Bhubaneswari Coomar Singh* [1892] 19 Cal. 19 and *Mansab Ail v. Gulab Chand* [1888] 10 All. 85, that since the instrument did not provide for interest post diem, any claim in the nature of a claim for such interest could be allowed, by way of damages only, and was not a charge on the land and that it was barred by limitation.

17. In *Thayar Ammal v. Lakshmi Ammal* [1895] 18 Mad. 331, Best and Subramania Aiyar, JJ., held that post diem interest was only claimable as

damages and that it was barred by limitation. The suit was on a mortgage dated 16th February 1880, and it was filed in 1893. Subramania Aiyar,

J. in an elaborate Judgment, held that where a mortgage document does not provide for post diem interest, the plaintiff can only claim it as

damages, for withholding the money and that such a claim would be barred, u/s 116 of the Limitation Act, if the suit is filed more than six years

after date, when the principal money became payable. The later decisions of Subramania Aiyar, J., which I shall refer to, however, show that the

learned Judge changed his view on the question.

18. In *Pedda Subbaraya Chetti v. Ganga Razulungaru* [1897] 20 Mad. 149, the suit was on a mortgage and the principal amount was payable on

the 24th of July 1886. The amount secured by the mortgage was arrived at, by calculating the principal and interest due on previous loans and the

mortgage was expressed to be for securing the payment of that principal, together with subsequent interest, that may accrue annually. It also

provided for compound interest. The learned Judges Shephard and Davies, JJ., after referring to the above facts observed:

These provisions are more consistent than otherwise with an intention, which in itself is the most probable one, when, to use the language of the

Judicial Committee, regard is had to the ordinary expectations of person entering into a mortgage transaction,

and post diem interest was allowed.

19. In *Jivanna Pandithar v. Appalu* [1899] 22 Mad. 339 the suit was on a bond executed in December, 1881, which provided that interest should

be paid every year and that the principal should be paid in December, 1884. Shephard and Subramania Aiyar, JJ., were of opinion that post diem

interest should be allowed, on the ground that the stipulation for payment of interest annually showed that it was not intended that interest should

cease, when the principal amount became payable.

20. In *Ghantayya v. Papayya* [1910] 23 Mad. 534, the amount due on the mortgage was payable, with interest at 12 per cent. in three annual

instalments and on failure of one instalment, the whole amount was to become due. There was no provision for post diem interest. It was held by

Subramania Aiyar and Moore, JJ. that post diem interest was payable so long as the principal sum was improperly withheld and that it was

certainly more reasonable to hold that the promise to pay interest in a document, like the one they were considering, was a promise to pay interest,

so long as the principal sum was improperly withheld and it does not raise any legal presumption in such cases, but that it was only the adoption of

a Rule of construction. The learned Judges were of opinion that the decision of the Privy Council in Mathura Das v. Raja Narain Bahadur [1897]

19 All. 39 supported their view and were disposed to follow the view, taken by Trevelyan and Banerjee, JJ., in Moti Singh v. Ramohari Singh

[1897] 24 Cal. 699.

21. In Narasimhayya Vs. Srinivasayya and Others, Sadasiva Aiyar and Spencer, JJ., held that post diem interest was recordable in cases of

mortgages, where a definite term is fixed in the bond for repayment, on the general promise of the debtor to be liable for interest. The learned

Judges were of opinion that they were bound by the decision of the Privy Council in Mathura Das v. Raja Narain Bahadur [1897] 19 All. 39 and

Bindesri Naik v. Ganga Saran Sahu [1898] 20 All. 171 and by the decisions of the Madras High Court in Ghantayya v. Papayya [1910] 23 Mad.

534 and Ramanathan Chetty Vs. Nur Muhamad Marakayar, to hold:

That post diem interest is payable, on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond, for

repayment of the principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking

(which may be called appurtenant to the principal undertaking) to pay interest upon arrears of interest and which further undertaking is found in the

same document following the provision to pay interest, it is difficult to hold that the parties intended that only the principal undertaking should apply

to the question of the liability for post diem interest and not the appurtenant undertaking also.

22. In Thathothathil Poker v. Ramchandra Shenoy [1915] 16 M.L.T. 478, it was held by Sir John Wallis, O.C.J., and Seshagiri Aiyar, J., that

post diem interest may be granted by way of damages, but that compound interest is not chargeable, after the date mentioned in the document.

23. In Daudbhai Rambhai v. Daudbhai Allibhai [1890] 14 Bom. 113, a suit was

filed in 1882, to redeem a mortgage effected in 1833. There was no period fixed for payment and the first Court decreed interest, from the date of the document to the date of redemption. On appeal, the District Judge held that interest could only be awarded for a period of six years. In the course of the argument, it was contended that the mortgagee could not claim interest, for more than 12 years under Article 132 of the Limitation Act. *Scott and Jardine JJ.*, held that interest was payable till the date of redemption.

24. In *Motan Lal v. Muhammad Bakhsh* 1922 Lah. 254 a Full Bench of that Court held that where a mortgage contains no express provision, for payment of interest, after the due date, there is no presumption, one way or the other, as to payment of post diem interest, that the determination of the question must depend entirely upon the interpretation of the document, that the mortgagee is however, entitled to damages on account of the failure to pay the debt, at the stipulated time, the measure of damages *prima facie* being the same, as the interest agreed upon and that in cases where the mortgagee is the plaintiff he can sue to recover post diem interest, only for the period prescribed by the law of limitation, applicable to a suit for compensation, for breach of contract, but that if the mortgagee is a defendant in an action, he is entitled to recover damages for the entire period, during which the principal sum remained unpaid.

25. I am unable to find anything in the mortgage document now in question which necessarily indicates that the parties did not intend to pay post diem interest. The granting of the power of sale is only a remedy, which is usually given, and the mortgagee is not bound to exercise the power, any more than he is bound to sue on the expiry of the due date, under penalty of his losing subsequent interest.

26. I think that the plaintiffs, who want to redeem the property mortgaged, are bound to pay interest post diem, up to the date of redemption, credit of course being given to any sums, which the defendants got from the mortgaged property, during the period they were in possession.

27. The next question relates to the manner in which accounts are to be taken. The mortgagee being in possession, Section 76 of the Transfer of Property Act applies to the period between 1882, when the Act was passed, and the date of the decree. As regards the period prior to that, the

Transfer of Property Act only codifies the general principles of equity in such cases and the same principle [would apply. Clause (h) of Section 76

of the Transfer of Property Act, after providing for the expenses incurred by the mortgagee, enacts that the receipts from the mortgaged property,

after deducting the expenses mentioned in Clauses (c) and (d), which relate to taxes and necessary repairs, should be debited against him, in

reduction of the amount (if any), from time to time, due to him, on account of interest, on the mortgage money and that any surplus should be

appropriated towards the reduction of the principal. In the present case, I think accounts are to be taken, in the manner prescribed by the section.

There is no warrant for compound interest being allowed. The expenses should be deducted from the income of the property, which is found by

the Official Referee to have accrued and the balance should be appropriated first towards the interest due and if there is any surplus, towards the

principal.

28. The report of the Official Referee will be modified and a final decree will be passed in the light of my above observations. The accounts will be

taken till this date. Time for redemption 4 months. In default of redemption, the plaintiffs will be foreclosed. Costs reserved.