

(1950) 04 PAT CK 0003
In the Patna High Court
Case No : A.F.O.D. No. 113 of 1946

Gajadhar Marwari and Others

APPELLANT

Vs

Baidyanath Mandal and Others

RESPONDENT

Date of Decision : 05-04-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Contract Act, 1872 — Section 16
Transfer of Property Act, 1882 — Section 76
Usurious Loans Act, 1918 — Section 3(1)

Citation : AIR 1950 Patna 379

Hon'ble Judges : Reuben, J;Jamuar, J

Bench : Division Bench

Advocate : B.C. De, J.M. Ghosh and S.S. Rakshit, for the Appellant; S.C. Mazumdar and S.K. Mazumdar, for the Respondent

Judgement

Jamuar, J.—This appeal is by defendants 1 to 4 (a), and arises out of a suit for redemption brought by the plaintiffs, who are members of a joint Hindu family and carry on business in coal under the name and style of Baidyanath Mandal and Co. The facts giving rise to the suit are these.

2. Thakur Girdhari Singh of Nowagarh was the proprietor of the two villages concerned in this case, namely, villages Kenduadih and Natundih. On 14th Chaitra, 1313 B.S. corresponding to 20th March 1907, he gave in lease by means of a registered patta (EX. 7) a plot of coal land having an area of 220 bigbas in village Kenduadih, as described in Schedule A of the plaints to one Praganna Kumar Bay. The lease is still subsisting.

3. Thereafter, Thakur Girdhari Singh died and the succession to his estate being governed by the law of lineal primogeniture he was succeeded by his eldest son Ran Bahadur Singh, who by a registered patta (EX. 7 (a)), dated 14th February 1921, gave in lease the coal mining rights in village Natundih, as described in Schedule B of the plaint, to one Damodar Prasad Lala. This lease is also

subsisting.

4. Then on 29th November 1922, Ran Bahadur Singh executed a mortgage, which is called either a usufructuary mortgage or an anomalous mortgage, by a registered deed (Ex. 9) in favour of the defendants 1 and 2 and the father of defendants 4 and 4 (a), named Sheodaumall Marwari, to secure a loan of Rs. 15,000 on the properties described in Schedules A and B of the plaint, and the mortgagees were said to have been put in possession of these properties, that is, of both the villages Kenduadih and Natundih. The mortgagees were entitled to recover rent and royalties from the leasehold properties, the minimum royalty for Schedule A property being Rs. 1,925 and that for Schedule B property Rs. 4,720 per annum. According to the plaintiffs, the dues under this mortgage bond had been fully satisfied from the rents and royalties realised by these mortgage deeds.

5. Ran Bahadur Singh executed another mortgage deed on 2nd February 1923, mortgaging the entire village Kenduadih along with some other properties to Srimati Frobhabati Devi, the widow of the late Rai Bahadur Jyotirmoy Chatterji. On her death, her son T.K. Chatterji instituted a suit, being Mortgage suit No. 17 of 1927, on the basis of that mortgage and having obtained a decree transferred it to one Suresh Chandra Dutta, who in his turn assigned it to Srimati Saralakshi Debi. She put the decree into execution and the entire village Kenduadih as also the property described in Schedule A of the plaint were sold and they were purchased by the plaintiffs on 15th July 1943. The plaintiffs obtained the usual sale certificate and also the delivery of possession through Court.

6. In these circumstances, the plaintiffs brought their suit, out of which this appeal has arisen, on 12th January 1944, against defendants 1 to 4 (a) as also against two other defendants, namely, Thakur Manmohan Singh, the son of Ban Bahadur Singh, as defendant 5 and Srimati Hira Kumari Devi, the wife of Thakur Manmohan Singh, as defendant 6. They claimed to be entitled to redeem the two villages Kenduadih and Natundih, which were given in mortgage to the defendants. Their further claim was that the stipulated rate of interest under the mortgage, namely, at the rate of 24 per cent. per annum compoundable with yearly rests, is excessive and penal and should be reduced.

7. The defendants, who are the appellants, contested the suit. Their main defence was that they as mortgagees were not put in actual possession of village Natundih by Ran Bahadur Singh and that the minimum royalty mentioned in their lease in respect of this village was kept in abeyance for a certain period awaiting the allotment of a railway siding in the vicinity of the village, and on 23rd December 1926, by a document) called a Patta Ran Bahadur Singh absolved the lessee of Natundih, namely, Damodar Prasad Lala, from payment of the minimum royalty according to the previous lease as he reduced it from Rs. 4720 to Rs. 1000 only. These defendants pleaded that, in these circumstances, in spite of all attempts, they were unable to realise anything from Damodar Prasad Lala as

royalty for village Natundih. They admitted their liability to render accounts to the plaintiffs but stated that they were entitled to the full benefit of the terms under the mortgage bond without any reduction in the stipulated interest. According to these defendants, the entire amount of principal and interest is still due. Their further defence was that the suit was barred by the principle of res judicata as the relief claimed in this suit had been directly and substantially in issue in two previous suits, namely, Money Suit No. 568 of 1934 and Money Suit No. 27 of 1941.

8. The learned Subordinate Judge of Dhanbad passed a preliminary decree for redemption. With regard to the rate of interest, which was mentioned in the mortgage bond, namely, 24 per cent. per annum compoundable with annual rests, the learned Subordinate Judge made a mention of Section 5, Bihar Money-lenders (Regulation of Transactions) Act, 1939, and stated that the maximum rate of interest provided under that section for a secured loan was 9 per cent. per annum simple, and proceeded to apply the provisions of Section 7 of the same Act and reduced the interest by holding that the defendants were entitled to no more than double the amount of principal as interest, as provided by that section.

9. The learned Subordinate Judge also came to the conclusion that the defendants never realised any profit out of village Natundih and as such they were not liable to account in respect of this village. He accordingly ordered that an account be taken of the profits realised from village Kenduadih from the date of the execution of the mortgage bond up to the date of the decree in order to ascertain whether the amount to which the defendants have been found entitled has been satisfied therefrom. He held that the amount thus found to have been realised by the defendants from Kenduadih would be set off towards their claim and in case the debt be found not to have been fully satisfied, the plaintiffs should be liable to pay the balance to redeem the Kenduadih property, as described in Schedule A of the plaint.

10. As against the decree passed by the learned Subordinate Judge, the defendant-appellants have preferred this appeal and the appeal has been confined only to the question of the interest payable on the principal amount of RS. 15,000. As I have just stated, the learned Subordinate Judge reduced the interest of 24 per cent. per annum compoundable with annual rests, as was mentioned in the mortgage bond, by applying the provisions of Section 7, Bihar Moneylenders Act. The contention of the appellants in this appeal is that neither Section 5 nor Section 7 of that Act can have any application to the present case with the result that the interest, as stated in the bond, should be left untouched, as it is neither excessive nor penal. The appellants have also contended that they are entitled to interest pendente lite as also to future interest till realisation of the amount found due to them.

11. The plaintiff-respondents have also filed a cross-objection against that part of the judgment of the learned Subordinate Judge in which he has found that the

defendants never realised any profit out of the Natundih property and that accordingly they were not liable to account in respect of that property. According to the plaintiffs, the defendant mortgagees either did in fact realise the rents and royalties in respect of the Natundih property as well or should be presumed to have done so, as they have deliberately suppressed their account books, and they should be made liable to account for the same as well.

12. I will first deal with the points raised in the main appeal. I am of the opinion that the defendant-appellants should succeed in their contention that neither Section 5 nor Section 7, Money-lenders Act can be made applicable to the suit out of which this appeal has arisen. That s. 5 cannot be applied is conceded. Section 5 deals with rates of interest in connection with a "suit brought by a money-lender in respect of a loan advanced after the commencement of this Act" (namely, the Money-lenders Act). Admittedly the loan in the transaction, with which we are concerned in this case, was advanced long before the commencement of the Money-lenders Act, as it had been advanced in the year 1922. Hence Section 6 of this Act can have no application.

13. Coming now to Section 7 of the Act, it seems to me that the provisions of this section also can have no application in the present case. This section reads as follows:

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court shall, in any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the Institution of the suit, which together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced, by such document."

14. Emphasis must be laid on the words

"no Court shall, in any suit brought by a money-lender pass a decree for an amount of interest. . . ."

Clearly the suit on the facts of which this section can be made applicable must have been brought by a money-lender. In the present case, before us the suit was not brought by a money-lender but by persons who are purchasers of the equity of redemption in execution of a mortgage decree obtained by certain mortgagees. The money-lenders in the suit are not the plaintiffs but the defendant-appellants. This difficulty seems to have been realised in the Court below, but the learned Subordinate Judge referred to Bengal Money-lenders Act, 1940; Clause (c) of Sub-section (22) of Section 2 of which Act provides that a suit to which that Act applies includes a suit for the redemption of any security given before or after the commencement of this Act in respect of any loan

advanced whether before or after the commencement of this Act."

The Bengal Act, therefore, applies to all suits brought for redemption regardless of who is the plaintiff. In the Bihar Act, on the other hand, there is provided a limitation. The learned Subordinate Judge, however, was of the opinion that the Bihar Act had been enacted to give relief to a borrower and that Section 7, Bihar Act should be made applicable in suits which were not brought by a money-lender. While I think that it is harsh upon the borrower not to get relief when he himself desires to pay the debt, this relief being only available to him if he is sued by the money-lender for the debt, and although the intention of the legislature may have been to give relief to the debtor in all cases, yet a Court of law is not concerned with what was or might have been the intention of the legislature. The Court has to construe the provisions of the Act and give effect to the meaning of the plain words of the section. The intention of the legislature cannot be invoked to override the express provisions of a section and, in the present case before me, of Section 7, Bihar Money-lenders Act the terms of Section 7, Bihar Act, are of a mandatory nature and the words admit of no ambiguity. The condition for the application of that section is that the suit must be brought by a money-lender in respect of a loan advanced. I am supported in my view by certain observations made in the case of *Bishunlal Singh v. Jagarnath Singh* AIR 1913 Pat. 185; 22 Pat. 148. The learned advocate for the plaintiff-respondents, however, referred to the case of AIR 1940 1 (Federal Court) in support of his contention that Section 7, Bihar Money-lenders Act, 1939, can be made applicable even in suits which have not been brought by money-lenders. In my view this decision does not support that contention. In that case their Lordships were considering the applicability of Section 1, (Bihar Act of 1939). When the executing Court was proceeding u/s 11, Bihar Money-lenders Act of 1938, Section 11 of the Act of 1938 having been re-enacted as 3. 7 of the Act of 1939, their Lordships held that, as Section 11 had been re-enacted as Section 7 in the Act of 1939, the appellants before them, who were the judgment-debtors, were entitled to claim the benefit of that provisions in the new Act. The question of the applicability of Section 7 of the Act of 1939 on the facts of that case was by itself not before their Lordships. I am, therefore, of the view that this case is of no assistance to the plaintiff-respondents. I would accordingly hold that the learned Subordinate Judge was in error in reducing the interest payable to the defendant-appellants by applying the provisions of Section 7, Bihar Money-lenders Act of 1939.

15. It was then argued that the interest, as mentioned in the mortgage bond, of 24 per cent. compoundable with annual rests was penal and excessive and ought to be red need. Some cases were placed before us on behalf of the plaintiff-respondents to show that the Courts have in appropriate cases reduced the interest from that which had been mentioned in mortgage bonds on the ground of its being excessive and penal. The learned advocate for plaintiff-respondents submitted that the provisions of Section 16, Contract Act might be applied in this case. Clause (1) of that section explains that a contract can be said to be induced

by "undue influence," namely, where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other, and Clause (a) of that section states that where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. The argument was that the transaction in this particular case was entered into by undue influence. It may be stated at, once that there is no material on the record nor any evidence to come to any such conclusion. It is impossible to say that this particular transaction was entered into by "undue influence" or that the mortgagees were in a position to dominate the will of the mortgagor. I do not think, therefore, that the provisions of Section 16, Contract Act, can be made applicable to the facts of this case.

16. The argument then turned to Section 3, Usurious Loans Act, 1918. Clause (1) of this section provides that where, in any suit to which this Act applies, the Court has reason to believe (a) that the interest is excessive ; and (b) that the transaction was, as between the parties thereto substantially unfair, the Court may exercise certain powers as provided by that section, for example, passing an order for the re-opening of the transaction. As will be noticed two conditions are essential for the application of this section, namely, (a) that the interest is excessive and (b) that the transaction was substantially unfair, and the explanation to that section provides that the interest may of itself be sufficient evidence that the transaction was substantially unfair. The interest may be excessive but it must be such that a Court may consider that the transaction was substantially unfair, that is to say, that the rate of interest may be so monstrous as to show that the transaction was harsh and unconscionable by itself. As I have already said, there is no evidence to show that the lender was in a position to exercise such influence as to dominate the will of the borrower. Mere excess of interest, by itself, can give no right to reopen any transaction but it may be such as to tender the transaction unconscionable. To borrow a phrase from Irish case *Thomas v. Ashbrook* (1913) 2 I. R. 416:

" . . . As to excess : the interest or charge may be ex facie so exorbitant as to make the conclusion irresistible that an unfair advantage has been taken of desperate necessity or reckless improvidence; the thing not merely speaks for itself, bat shouts."

Furthermore, the re-opening of a transaction is for the purposes of relieving the debtor of all liability in respect of the excessive interest. The relief is to the debtor. In the present case, the relief sought is by the plaintiffs, who are act the debtors; they are purchasers of the equity of redemption of the mortgagor and thus not themselves debtors.

17. We were not referred to any evidence to support the contention about the unfairness of the transaction but reliance was placed on the explanation to Sub-

section (2) of Section 3, Usurious Loans Act and our attention was drawn to the rate of interest itself, i. e. 2 per cent. per month, compoundable with yearly rests. Reference was made to certain decisions which it is urged support that conclusion in the present case. *Mt. Rukmina and Others Vs. Mohib Ali Khan and Others*, is an authority u/s 16, Contract Act and not the Usurious Loans Act. In *Sharag Narayan v. Dwarka Prasad* 3 Pat. 365 : A. I. R. 1924 Fat 580 24 per cent. per annum with yearly rests was reduced to 12 per cent. simple but, apparently, there was evidence before the Court that 12 per cent. simple was the market rate. *Butto Kristo Roy v. Gobindram* A. I. R. 1939 Pat. 640: 182 I. C. 132 was not a case of loan at all but of interest on arrears of rent. In *Chota Nagpur Banking Association Ltd. Vs. Lal Mohan Trivedi and Others*, the point was not contested before the High Court and the report does not disclose what the grounds were on which the contract rate of 10 per cent. per annum was reduced to 9 per cent. per annum. In AIR 1939 200 (Privy Council) also the report does not disclose the grounds on which an interest of 24 per cent. per annum compoundable with 6 months rests was held to be within the mischief of Section 3, but the judgment of the Privy Council shows that an amount of Rs. 6000 was the principal of the loan in suit and as much as RS. 2800 was due on account of interest due to the creditor on previous transactions between the parties. This is a circumstance which materially affects the fairness of the rate of interest (vide *Prayag Lal v. Palakdeo Narain Singh* AIR 1912 Pat. 419: 202 I.C. 634. On the other hand, in the case of *Mukteswar v. Satya Charan* A. I. R. 1989 Pat. 360 : 180 I. C. 109 an interest of 18 per cent. per annum compoundable every six months was held not to attract the operation of Section 3. In these circumstances, it seems to me to be impossible to reduce the rate of interest.

18. The question, however, remains whether any relief can be given to the plaintiffs at all in the matter of interest. Although the circumstances point to the conclusion that the interest as claimed is high but as it cannot be held that the transaction was unfair as between the parties to the suit, no relief can be given under the Usurious Loans Act. The Court, however, may take the high rate of interest into consideration in exercising its discretion as regards pendent lite and future interest. The granting of pendent lite and future interest lies in the discretion of the Court. See AIR 1940 20 (Federal Court) . In the case before us the mortgagees will be getting a high rate of interest for a considerable period of time. While therefore holding the defendant-appellants to be entitled to interest at the bond rate from the date of the mortgage up to the date of the institution of the suit, I would allow them interest, pendent lite and future, at 4 per cent. simple per annum ; the period of grace shall be six months from the date on which the Subordinate Judge confirms and countersigns the account taken by the Commissioner, Their appeal is accordingly allowed.

19. Coming now to the cross-objection of the plaintiff respondents, the point for consideration, as I have already stated, is whether the defendants can be found to have realised the rent and royalty in respect of the Natundih property and thus be liable to account for that property as well. The learned Subordinate

Judge has found this part of the case in favour of the defendants, namely, that they never realised any profit out of the Natundih property and that therefore they are not liable to account for the same. The circumstances are these. [After stating the facts and referring to documentary and oral evidence his Lordship proceeded]: By this evidence it is apparent that the realisation could have been made from Dimodar Prasad Lala and the mortgagees, the defendant-appellants, failed to take steps to realise the royalty from him for no satisfactory reason. In the mortgage bond (exhibit 9) executed in favour of the defendants by Ran Bahadur Singh Ran Bahadur had stated :

"You shall possess right and title to the said properties like me and shall be competent to realise the amount due to you under this mortgage bond by selling the same."

and then they were given the right to realise the minimum royalty of the jama. I think that the mortgagees in the circumstances are accountable for the profits of the Natundih property on the footing of wilful default. Under the mortgage, the mortgagee was entitled to realise Rs. 4720 and could enforce his demand by bringing the leasehold to sale. But it is evident from the parwana dated 14th August 1923 and the pattft-dated 23rd December 1926, that the property was incapable of bearing this amount of minimum royalty. We may take the reinimum royalty agreed to be paid from 23rd December 1926, namely, Rs. 1000, as representing the value of the leasehold, and proceed on the assumption that if the mortgagee had proceeded with due diligence to recover the royalty due from this leasehold he would have recovered the equivalent of Rs. 1000 a year. To this extent therefore credit should be given to the mortgagor in the accounting between him and the mortgages beginning from the expiry of 1927. Under Clause (g), Section 76, T. P. Act, a mortgagee in possession

"must keep clear, full and accurate accounts of all sums received and spent by him as mortgages, at any time during the continuance of the mortgagee, give the mortgagor, at his request and cost, true copies of such accounts and of the vouhers by which they are sap potted."

The mortgagees is the present case have filed no account whatsoever as probably no such account was kept. An inference, therefore, adverse to the case of the mortgagees must he drawn.

20. In the Court below, a contention appears to have been raised on behalf of the defendants that the question whether they were liable to account for the Natundih property or not had been directly and substantially in issue in Money suit No. 568 of 1934 and in Money Suit No. 27 of 1941, and as such these decisions operated as *res judicata*. The Court below did not accept this contention and it was not pressed before us.

21. In these circumstances, I am of the opinion that the cross objections filed by the plaintiff-respondents should succeed and the decree of the Court below be varied to include the profit realised from the Natundih property in the light of the

observations made in the body of the judgment together with the profits realised from Kenduadih property.

22. Since success has been partial both in the appeal and in the cross objection, I would not pass any order as to costs is this Court.

23. Before I conclude I desire to draw the attention of the Court below to the form in which the decree of that Court has been drawn up. The decree in the suit should have been drawn up in the appropriate form to be found in Appendix D of the Schedule 1, Civil P. C.

Reuben, J.

24. I agree.