(2019) 02 GUJ CK 0113

In the Gujarat High Court

Case No : R/Second Appeal No. 218 Of 1989

Sanjay Induprasad Devshanker Bhatt — APPELLANT

Vs

Kutbuddin Sarfuddin Munshi & 11 Other(S) Since Decd.Through Heirs & 6 Other(S) — RESPONDENT

Date of Decision : 26-02-2019

Acts Referred:

Code of Civil Procedure, 1908 — Section 100
Bombay Tenancy & Agricultural Lands Act, 1848 — Section 32
Bombay Money Lenders Act, 1946 — Section 23
Transfer of Property Act, 1882 — Section 60
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 2(6), 32

Citation : (2019) 02 GUJ CK 0113

Hon'ble Judges : Vipul M. Pancholi, J

Bench : Single Bench

Advocate : Hm Parikh, Sn Thakkar

Final Decision : Allowed

Judgement

1. This Second Appeal, which is filed under Section 100 of the Civil Procedure Code, 1908 by the appellants - original plaintiffs, is directed against the judgment and decree dated 26.09.1989 passed by the 2nd Extra Assistant Judge, Ahmedabad (Rural) at Mirzapur in Regular Civil Appeal No.103/1983.

2. The factual matrix of the present case is as under:-

2.1 The immovable property being agricultural land bearing Survey Nos.131, 133, 134 and 165 situated in the sim of Village : Ghodasar, District : Ahmedabad was held by one Moijuddin. The said immovable property was granted to him by the Government subject to certain terms and conditions.

2.2 The pedigree of Farkuddin, who is father of said Moijuddin, is as under :-

Fakruddin (Died in 1919)

Moijuddin (I) (Died in 1914)

Sarfuddin (Died in __)

Nizamuddin (Died in 1917)

Faridduddin (Died in 1919)

Nasiruddin

Shahabuddin

Kutubuddin (Ori. def.No. 5)

Samsuddin (Ori.def. No.6)

Moujuddin (II)

Hussenibegam (Ori. mortgagor)

Mumtasuddin (Ori.mortgagor)

Hussa inuddin (Ori.mortgagor)

Moijuddin (III) (Ori.mortgagor

2.3 Regular Civil Suit No.676/1920 was filed by one Safruddin for partition of various properties of the deceased, Farkuddin including the aforesaid properties. The preliminary decree was passed in the said civil suit and land bearing Survey Nos.131, 133, 134 and 165 (in short "suit property") came to the branch of Moijuddin (I). By virtue of the preliminary decree passed by the concerned Civil Court, there was also decree passed for an amount of Rs.7,525/- on account of mesne profit in favour of one Safruddin against the estate of Moijuddin.

2.4 In the year 1935, said Safruddin filed execution proceedings to recover the decreetal amount from Moijuddin as per the preliminary decree, wherein except for land bearing Survey No.131, other three survey numbers i.e. Survey Nos.133, 134 and 165 were attached. Thereafter in July, 1935, land bearing Survey Nos.133, 134 and 165 were sold in an auction. On 05.05.1939, the sale certificate was issued in favour of one Soni Keshavlal Jhaverdas and, thereafter, the execution proceedings were disposed of on 05.09.1949.

2.5 At this stage, it is required to be noted that pending attachment, the grandson of Moijuddin (I) viz., Mumtasuddin, Hussainuddin, Moijuddin (III) and Hussainibega - widow of Hussainuddin (in short "mortgagors") mortgaged the suit property by way of registered mortgage in favour of one Trikamlal Jethalal Desai i.e. the "mortgagee" for consideration of Rs.3,000/-. At this stage, it is required to be noted that the original defendant nos.1 to 4 are the legal heirs of the deceased, Trikamlal Jethalal Desai.

2.6 The original defendant no.5 viz., Kutubuddin Safruddin Munshi and the original defendant no.6 viz., Samsuddin Safruddin Munshi purchased the land bearing Survey Nos.133, 134 and 165 from the heirs of the auction purchaser i.e. Soni Keshavlal Jhaverdas on 05.07.1939. On 19.11.1943, the said Trikamlal

Jethalal Desai assigned his rights of mortgagee in favour of Kutubuddin Safruddin Munshi and Samsuddin Safruddin Munshi i.e. the original defendant nos.5 and 6 by way of assignment deed. At this stage, it is required to be noted that so far as land bearing Survey No.131 is concerned, the said land was in possession of the tenant prior to 1943.

2.7 Thereafter on 17.07.1947, the original plaintiff viz., Induprasad Bhatt had purchased from the mortgagors equity of redemption in respect of the suit property and thereby he stepped into shoes of the mortgagors. The said plaintiff, who is purchaser of equity of redemption of the suit property, filed Regular Civil Suit No.2119/1953 on 24.12.1953 in the court of the Civil Judge, Ahmedabad for redemption of the mortgage and injunction restraining the respondents from receiving the amount of compensation from the Government. In the said civil suit, the original defendant nos.1 to 4 filed written statement vide Exh.23, whereas the original defendant nos.5 filed his written statement vide Exh.26, which was adopted by the original defendant no.6 vide his purshis at Exh.27.

2.8 The trial court, after considering the oral as well as documentary evidence produced before it, passed decree in the year 1959 in favour of the heirs of the original plaintiffs, who died pending the suit, by passing preliminary decree. The original plaintiffs filed Civil Appeal No.170/1959 challenging the part decree passed by the trial court in the aforesaid suit, wherein the original defendants filed their cross- objection. The Appellate Court modified the decree while allowing the Appeal of the original plaintiffs in the year 1961 as under,

"the redemption of Survey Nos.131 (whole) and 3/7th share out of Survey Nos.133 and 134 and 3/7th share in the compensation amount received for Survey No.165 and also ordered for appointment of a Court Commissioner for the purpose of determining the price of Survey No.133(whole) and 0 Acre - 21 Gunthas out of Survey No.134 at the time when Survey Nos.133 and 0 Acre- 21 Gunthas out of Survey No.134 were given over to one Manekji by the defendants."

2.9 Thereafter, land bearing Survey No.131 was sold to the tenant under the provision of Section 32(g) of the Bombay Tenancy & Agricultural Lands Act, 1848 in the year 1968 and the occupancy price of Rs.5,312.50 was required to be paid by the tenant under the aforesaid Act. The said occupancy price was received by the original defendant nos.5 and 6 from the concerned revenue authorities.

2.10 Thereafter, Second Appeal No.745/1961, which was filed by the original defendant nos.5 and 6 before this Court against the order of the Appellate court passed in the year 1961, was partly allowed and the preliminary decree was modified as under,

"Preliminary Decree under Order 34 Rule 7 of the Code of Civil Procedure shall be drawn up as follows:-

(A) The plaintiff is entitled to redeem Survey No.131 shown in mortgage deed

Exh.145 dated 17.09.1936.

(B) The Commissioner appointed by the Trial Court, or to be appointed by it shall take the following accounts:-

(i) An account of what is due on this date to the defendants for principal and interest in respect of the mortgaged evidenced by Exh.145 the interest to be calculated at the rate specified in Exh.145;

(ii) An account of the income of Survey No.131 received by the defendants upto this date or by any other person by their order or for the use of the defendants which, without willful default of the defendants or such person might have been so received;

(iii) An account of all money properly incurred by the defendants upto this date for costs, repairs, charges and expenses (other than the costs of the suit and appeals) in respect of Survey No.131 together with 12% interest thereon;

(iv) In account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendants and which is destructive of or permanently injurious to the property or by their failure to perform any of the duties imposed upon them by any law for the time being in force or by any terms of the mortgaged deed.

(C) Paragraphs 2, 3, 4 and 5 in Form-7 in Appendix-D to the Code of Civil Procedure, 1908 shall be retained. The Trial Court shall make an appropriate order if a fresh order is required to be made for the appointment of Commissioner, for his fees and for him to submit report to it. 7th January, 1971 shall be the date for plaintiffs to pay into the trial court such sum as may be found due. The Court may, if necessary, extend the said date."

2.11 Thereafter, Regular Civil Suit No.2119/1953, which was pending for passing decree, was transferred from the City Civil Court, Ahmedabad to District Court, Ahmedabad and renumbered as Regular Civil Suit No.168/1971.

During the pendency of the said suit, the Court Commissioner filed his report on 02.11.1982, which is produced at Exh.334 and the parties have filed objection at Exhs.335 & 339. On 30.04.1985, the trial court partly decreed the suit and the original defendant nos.5 and 6 (the respondent nos.1 and 2 herein) were directed to pay an amount of Rs.5,990.00 to the plaintiffs with simple interest at the rate of 12% p.a. on the said amount from 1970 till its realization. 2.12 The original defendant nos.5 and 6, therefore, filed Regular Civil Appeal No.103/1983 in the court of the 2nd Extra Assistant Judge, Ahmedabad (Rural) at Mirzapur, Ahmedabad, which was allowed by the Appellate Court on 26.09.1989 and the suit for redemption of mortgage filed by the plaintiffs i.e. the appellants herein was decreed in favour of the original defendant nos.5 and 6. The Appellate Court passed decree for recovery of Rs.1,04,135/- against the plaintiffs/ appellants with cost and interest at the rate of 12% p.a. on the said amount against the assets of the plaintiffs and the final decree was directed to be drawn under Order

34, Rule 8 of the Civil Procedure Code, 1908. Against the said order, present Second Appeal is filed by the original plaintiffs.

3. In the present Second Appeal, this Court while admitting the Appeal, has framed following substantial questions of law,

"(1) Whether in the facts and circumstances of this case, the Courts below committed an error of law in passing a money decree in favour of the mortgagees?

(2) Whether in view of the provisions of the Bombay Money - Lenders Act, the first Appellate Court committed an error of law in passing a decree for Rs.1,04,135/-?"

4. At this stage, it is required to be noted that along with the Second Appeal, Civil Application No.2098/1989 was filed seeking stay against the order of the first Appellate court and this Court, by an order dated 27.12.1989, granted conditional stay of the execution of the decree passed by the first Appellate Court pending present Appeal.

5. Heard learned advocate, Mr. H.M. Parikh assisted by learned advocate, Mr. S.N. Thakkar for the appellants. Though served, no one appears for the respondents.

6. At this stage, it is required to be noted that the concerned original defendants died during pendency of the present Second Appeal and, therefore, various civil applications were filed for bring legal heirs of the deceased - respondents and this Court passed various orders in those civil applications filed by the present appellants.

7. Learned advocate, Mr. Parikh appearing for the appellants mainly contended that the property being Survey No.131 was sold to the tenant under the provisions of Section 32(g) of the Bombay Tenancy & Agricultural Act and the occupancy price of Rs.5,312.50 payable by the tenant under the said provision was received by the assignees of rights of mortgagees i.e. original defendant nos.5 and 6 from the revenue authorities and, hence, the said property i.e. the land bearing Survey No.131 was not available to the plaintiffs/ appellants for redemption thereof and, therefore, the first Appellate Court has committed an error in passing money decree in favour of the mortgagees. It is further contended that the property in question, for which, the redemption was sought in the suit, was already lost to the tenant and the amount received in respect thereof has been appropriated by the original defendant nos.5 and 6. At this stage, it is contended that even assuming that the appellants have to redeem the mortgage, the respondents/ mortgagees were not in a position to deliver back or restore the possession of the mortgaged property to the plaintiffs/ appellants and, hence, the first Appellate Court has committed grave error in not considering the aforesaid important aspect of the matter.

8. Learned advocate, Mr. Parikh would thereafter contend that the first Appellate

Court has committed grave error in passing the decree against the plaintiffs/ appellants in the present form as such decree could not have been passed under Order 34, Rule 8 of the Civil Procedure Code, 1908 in light of Form Nos.7D, 7E and 7F of Appendix - D of the Civil Procedure Code, 1908.

9. Learned advocate, Mr. Parikh would further submit that the first Appellate Court has wrongly passed decree for an amount of Rs.1,04,135/- with future interest at the rate of 12% p.a. on the said amount against the assets of the deceased - plaintiffs in the hands of the heirs without properly appreciating the provisions contained in Bombay Money Lenders Act, 1946. At this stage, learned advocate for the appellants has referred to Section 23 of the said Act. It is submitted that the power has been conferred upon the Courts to limit the interest notwithstanding anything contained in any agreement or any law for the time being in force in respect of loan advanced before or after the date on which the said Act comes into force. It is submitted that thus the first Appellate Court erred in allowing the interest to be calculated on compounded basis.

10. At this stage, learned advocate for the appellants has placed reliance upon the decisions rendered by this Court in case of Lohana Gomtibai Madhaji Vs. Pokaram Brahmin Ramakant Ratilal & Ors., reported in 1985 GLH 741. It is contended that in view of coming into force of the Bombay Money Lenders Act, 1946, the provision of the said Act was required to be applied at the time of passing of decree and decree on account of interest could not have been more than the principal amount due.

11. Learned advocate for the appellants has also placed reliance upon the following decisions,

(1) In the case of Mhadagonda Ramgonda Patil Vs. Shripal Balwant Rainade, reported in AIR 1988 SCC 1200.

(2) In the case of S. Vardachariar & Ors. Vs. Gopala Menon & Ors., reported in AIR 1967 SC 412.

(3) In the case of Sheo Kumar Vs. Vishwa Nath Singh & Ors., reported in AIR 1960 Allahabad 217.

12. Learned advocate, that the impugned Appellate Court be Mr. Parikh, therefore, urged decree passed by the first quashed and set aside and the present Second Appeal be allowed.

13. Having heard learned advocate appearing for the appellants and having gone through the material produced on record, it is revealed that the dispute is with regard to the immovable property i.e. land bearing Survey No.131 situated at Village : Ghodasar, District : Ahmedabad. The said property was in possession of the tenant prior to 1943 and in the year 1963, the said property was sold to the tenant under Section 32(g) of the Bombay Tenancy & Agricultural Act and he had paid the occupancy price of Rs.5,312.50 to the revenue authorities and the same was received by the original defendant nos.5 and 6 from the revenue authorities.

In proceeding of Regular Civil Suit No.168/1971, which was transferred from the City Civil Court, Ahmedabad to the District Court, Ahmedabad, relying upon the report submitted by the Court Commissioner vide xh.334, the trial court partly decreed the suit and the original defendant nos.4 and 5 were directed to pay an amount of Rs.5,990/- to the plaintiffs with simple interest at the rate of 12 p.a. on the said amount from 1970 till the date of its realization.

Against which, the original defendant nos.5 and 6 filed Regular Civil Appeal No.103/1983 and the decree passed by the trial court was set aside and the said Appeal was allowed and the suit for redemption of mortgage filed by the plaintiffs was decreed in favour of the original defendant nos.5 and 6 and further decree was passed for the recovery of Rs.1,04,135/- against the plaintiffs/ appellants with future interest at the rate of 12% p.a.

14. At this stage, this Court would like to refer to the provision contained in Section 23 of the Bombay Money Lenders Act, 1946, which reads as under,

"23. Power of Court limit interest recoverable in certain cases. - Notwithstanding anything contained in any agreement or any law for the time being in force, no Court shall in respect of any loan whether advanced before or after the date on which this Act comes into force, decree, on account of interest, a sum greater than the principal of the loan due on the date of the decree."

15. The Order 34, Rule 8 of the Civil Procedure Code, 1908 reads as under,

"R. 8. One person may sue or defend on behalf of all in same interest

(1) Where there are numerous persons having the same interest in one suit,-

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub- rule (3) of Rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit

under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation. -For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be]."

16. In case of Mhadagonda Ramgonda Patil (supra), the Hon'ble Supreme Court has observed in Para Nos.2, 8, 9, 10 and 11 as under,

"2. On June 16, 1925, the predecessors-in- interest of the respondents executed a possessory mortgage bond for Rs. 5,000/- in favour of the predecessor-in-interest of the appellants. The mortgage bond contained a recital that the mortgagee should appropriate the income of the property consisting of some plots of land towards the sum of Rs. 3,000/- and was entitled to interest @ 9 % per annum for the balance sum of Rs. 2,000/-. By a second mortgage bond, which was by way of a simple mortgage executed on September 3, 1928, the mortgagors mortgaged the same property to the same mortgagee to secure repayment of a further loan of Rs. 2,000/- with interest @9% per annum.

8. Being aggrieved by the judgment and decree of the learned Joint Civil Judge, the appellants preferred an appeal to the High Court. At the hearing of the appeal, it was contended by the appellants that the second suit for redemption was not maintainable; that the rule of Damdupat was not applicable to mortgages and that the appellants had become protected tenants by virtue of the Bombay Tenancy and Agricultural Lands Act. It was held by the High Court that in spite of the fact that in the earlier suit a preliminary decree and a final decree were passed and the mortgagors did not redeem the mortgages by depositing the decretal dues, still the right of redemption was not extinguished. As to the applicability of the rule of Damdupat to mortgages, the High Court took the view that the learned Joint Civil Judge was justified in applying the rule following certain decisions of the Calcutta, Bombay and Nagpur High Courts, which will be referred to presently. Regarding the plea of the appellants that they had become protected tenants under the Bombay Tenancy and Agricultural Lands Act, it was held that as the plea was raised by the appellants Nos. 3, 4 and 5, the amount-of land which happened to be in possession of the said appellants Nos. 3, 4 and 5, would be referred to the Mamlatdar and excepting such land the learned Joint Civil Judge was right in decreeing delivery of actual possession of

the, rest of the land in suit in favour of the respondents. Subject to this modification, the High Court affirmed the decree of the learned Joint Civil Judge and dismissed the appeal with costs. Hence this appeal by special leave.

9. In this appeal, the appellants have challenged the findings of the High Court as to the maintainability of the second suit for redemption out of which this appeal arises and the applicability of the rule of Damdupat. The finding and direction of the High Court in respect of the plea of the appellants that they had become protected tenants under the Bombay Tenancy and Agricultural Lands Act have not been challenged before us.

10. Mr. Krishnamurthy, learned Counsel appearing on behalf of the appellants, has urged that in view of the fact that a preliminary decree and a final decree were passed in the earlier suit in accordance with the provisions of Order XXXIV, Rules 7 and 8 of the Code of Civil Procedure, the present suit for redemption of the selfsame mortgages, out of which this appeal arises, is not maintainable. It is submitted by him that after a preliminary and a final decree for redemption are passed in accordance with the provisions of Order XXXIV, Rules 7 and 8 of the Code of Civil Procedure, the mortgage-debt merges in the decretal-debt and the right of redemption is extinguished. In support of his contention, the learned Counsel has placed much reliance upon a decision of the Patna High Court in Sheo Narain Sah v. Mt. Deolochan Kuer, AIR 1948 Pat 208. In that case, the appellant had purchased a share in the equity of redemption and one of the questions was whether the right of partial redemption acquired by the appellants would survive under Order XXXIV, Rule 5 of the Code of Civil Procedure until confirmation of the same in the execution proceedings. In that context, it was observed that the mortgage-debt had merged in the decretal- debt and after the passing of the final decree for sale neither the right of total redemption nor the right of partial redemption, conferred on the mortgagor by section 60 of the Transfer of Property Act, survived the final decree for sale; all that remained thereafter was a different right of redemption conferred by Order XXXIV, Rule 5. The observation regarding the merger of the mortgage-debt in the decretal-debt is, in our opinion, to some extent obiter.

11. Section 60 of the Transfer of Property Act confers a right of redemption on the mortgagor. The proviso to section 60 reads as follows :-

"Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court." 11A. It is thus manifestly clear that the right of redemption will be extinguished (1) by the act of the parties, or (2) by the decree of Court. We are not concerned with the question of extinguishment of the right of redemption by the act of the parties. The question is whether by the preliminary decree or final decree passed in the earlier suit, the right of the respondents to redeem the mortgages has been extinguished. The decree that is referred to in the proviso to Section 60 of the Transfer of Property Act is a final decree in a suit for foreclosure, as provided in sub-rule (2) of Rule 3 of Order XXXIV and a final decree in a redemption suit as provided in

Order XXXIV, Rule 8(3)(a) Of the Code of Civil Procedure. Sub-rule (2) of Rule 3, inter alia, provides that where payment in accordance with sub-rule (1) has not been made, the court shall, on an application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all rights to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property. Thus, in a final decree in a suit for foreclosure, on the failure of the defendant to pay all amounts due, the extinguishment of the right of redemption has to be specifically declared. Again, in a final decree in a suit for redemption of mortgage by conditional sale or for redemption of an anomalous mortgage, the extinguishment of the right of redemption has to be specifically declared, as provided in clause (a) of sub-rule (3) of Rule 8 of Order XXXIV of the Code of Civil Procedure. These are the two circumstances (1) a final decree in a suit for foreclosure under Order XXXIV, Rule 3(2); and (2) a final decree in a suit for redemption under Order XXXIV, Rule 8(3)(a) of the Code of Civil Procedure - when the right of redemption is extinguished."

17. In case of S. Vardachariar (supra), the Hon'ble Supreme Court has observed in Para Nos.9, 10 and 11 as under,

"9. It appears to us, therefore, that in the opinion of a member of Judges of the Madras High Court who were cognizant of the state of affairs prevailing in the State interest beyond the rate of 12 per cent per annum simple would be considered excessive by Courts of law where the security was not inadequate and the risk run by the creditor was not abnormal. There can be no dispute that interest payable at the rate of 10 per cent compoundable annually over a number of years would be more in the interest of the creditor than 12 per cent per annum simple for the same period. In our opinion the learned Judges of the Division Bench of the Madras High Court were right in holding that 10 per cent compound interest with yearly rests would meet the justice of the case. The security was not inadequate and the threat of suit by Alavandar in view of the fact that his earlier suit which had been taken. in appeal to the Madras High Court and subsequently lost, was never regarded seriously. This is corroborated by the fact that even after the institution of that suit in 1937 the appellant before us advanced further sums of money to Dhanakoti Ammal at the same rate of interest as before. If he had thought that his security was put in jeopardy by the institution of the suit he would have been careful not to advance any further amounts and would in any case have insisted on the rate of interest being higher than that provided for in the earlier mortgages.

10. In our opinion the division bench of the Madras High Court made a correct assessment of the situation and their pronouncement with regard to the rate of interest prior to the date of the suit ought not to be disturbed.

11. We also find no reason to interfere with the scaling down of the rate of interest to 6 per cent from the date of the filing of the suit. Although the reasons are not indicated, it seems fairly plain that their Lordships were using their

discretion as regards interest pendente lite . We cannot overlook the fact that the mortgages were executed as far back as 1936 and 1938 and that the creditor who had waited till 1950 for the institution of the suit would, in any event, get interest substantially exceeding the principal amount of the loans. In this view of things we are not prepared to interfere with the exercise of the discretion exercised by the learned Judges of the Madras High Court even though they have given no reasons sons for the reduction of rate of interest pendente life."

18. In case of Lohana Gomtibai Madhaji (supra), this Court has observed in Para Nos.13 to 16 as under,

"13. The learned counsel for the mortgagee submitted that the suit transaction was made in 1935 in Saurashtra area and this Act was made applicable in that area only in 1962 and, therefore, this Section would not be applicable to the. present case. The present suit is filed in 1970 and the Section in very clear and uncertain terms provides 'notwithstanding anything contained in any agreement or any law' the court shall not decree on account of interest a sum greater than the principal due on the date of the decree. Therefore, at the time when the court passes the decree, the court has applied the law contained in this Section and the court has no jurisdiction to pass a decree on account of the interest a sum greater than the principal of the loan due.

14. The learned counsel for the mortgagor has argued that "on account of the interest" would include not only the interest in arrears but also the interest paid in past, payable at present and that may become payable in future, taking into account the interest that has been paid or payable the court has to see that on account of interest the creditor does not pay the sum larger than the principal amount due and in this connection he has relied on the definition of the term "interest" in Section 2 (6) which provides that 'interest includes any sum, by whatsoever name called, in excess of the principal paid or payable to a money-lender in consideration of or otherwise in respect of a loan'.

15. Reference was also made to a judgment of the Supreme Court in the case of K. Manik Chand and Others v. Elias Saleh Mohamed Sail and Others, AIR 1969 SC 671. In that case the Supreme Court was construing Section 17 of the Mysore Money-lenders Act which was in a form of a directive to a court not to pass a decree on account of arrears of interest for a sum greater than the principal of the original loan and the Supreme Court held that the directive was to be carried out by the court at the time of passing of the decree and the maximum prescribed for the arrears of interest must therefore be 3 held to be maximum amount in respect of interest payable upto the date of the decree when the court carries out the directive laid down in that Section. In that case before the Supreme Court the language of the Section was 'on account of arrears of interest'. The learned counsel for the mortgagor submits that in the present case it is not 'arrears of interest' but 'interest' only and the 'interest' is denned as to include the sums paid as well as payable. It is true that the language is different but the effect is not different; because the direction and prohibition is to the

court not to award in excess of the principal amount of the loan due on the date of the decree. Therefore, the court is required to find out the amount of loan due on the date of the decree and the court is directed not to pass a decree on account of interest sum greater than the principal amount found due on the date of the decree. It is thus clear that on account. of interest the court is required to find out the interest due on the date of the decree 20 and while doing so necessarily the amount of interest which has been paid or appropriated towards interest has to be deducted and excluded on account of interest. Therefore, effect is the same as was in the judgment of the Supreme Court in Mysore Case. Moreover, the definition of the word 'interest' in Section 2 is not absolute and it is 'unless there is anything repugnant in the subject or context'. In the context of Section 23 where the words are 'on account of interest' on the date of the decree, interest 25 already paid, appropriated and adjusted cannot be the subject-matter of the decree and, therefore, that definition cannot be bodily and literally inserted and read in Section 23; because it would entirely distort the context.

16. The learned counsel for the mortgagee has also submitted that in the present case there was an agreement to pay compound interest on the interest arrears at the interval of every four months and 30 there was an agreement to pay interest on such arrears of interest at the same rate. However, the mortgagee has failed to maintain any accounts to show that from time to time rent income was insufficient to pay the interest and that interest had been in fact accumulating and it was credited towards principal at any time. If he had maintained true and correct accounts in accordance with his liability under Section 76, the rental income might have been clearly sufficient to take care of the interest becoming due from time to time. However, since he has failed to maintain any such account and he has failed to carry the interest due towards the principal from time to time, it is impossible to hold such amount as the principal amount. It appears that the agreement is merely to pay interest on interest, and not that the accumulated interest is to be compounded with the principal amount. Since the principal amount was advanced by way of loan at that interest, it is a loan as defined in Section 2(9) and Section 23 is clearly attracted and applicable in the present case and, therefore, no amount by way of interest can be decreed on the date of the decree in excess of the principal amount found due on the date of the decree. Since on the date of the decree the principal amount found due is Rs. 541/ he will be entitled to the amount of interest upto the date of the decree to be that amount only. Therefore, the mortgagee would be entitled to a sum of Rs.1082/- on1y on the date of the decree."

19. In case of Sheo Kumar (supra), the Allahabad Court has observed in Para Nos.6 and 7 as under,

"6. Two important points deserve to be noted at this stage. The first is that a perusal of Sub-clauses (1) and (2), cited above, indicates that the decree of foreclosure is passed not because the judgment-debtor has failed to make payment of any balance but because he has failed to make payment of the entire amount. In other words, it is passed not in lieu of any unpaid balance but in lieu of the failure to pay the entire decretal amount.

7. The second important point to note is that a perusal of Sub-clauses (2) and (3) cited above indicates that where the entire amount has not been paid, under the law it is the transfer of property mortgaged that operates as a complete discharge of the claim of the mortgagee under the decree. In other words, the law does not entitle the mortgagee decree-holder to claim anything more than the property mortgaged to obtain full satisfaction of his decree. The mortgagee is not entitled to appropriate any partial payments made by the judgment-debtor in court towards the satisfaction of his decree. Thus under the law the decree-holder is either entitled to the entire amount of money or the entire property. He cannot have both.

To allow him to have both would not only be against law but also against equity. Neither the directions given by the court in the order nor the decree which is passed on the basis of the same make any provision for taking account of any partial payment. In fact, they could not do so, as the law itself does not make any such provision. If the intention of the law was that in addition to the property, the mortgagee would further be entitled to the payment of any money deposited in the meantime, one would have thought that the law would have expressly laid it down. In the absence of any specific provision in that regard, I do not see why the equitable interpretation of which this provision of law is capable and which is in favour of the judgment-debtor should not be accepted as the correct one."

20. In view of the aforesaid decisions of the Hon'ble Supreme Court as well as the Allahabad Court, it can be said that the mortgaged property was in possession of the tenant prior to 1943. If the facts of the present case are examined, it can be said that the mortgaged property, which was in possession of the tenant prior to 1943, has been lost to the said tenant under the tenancy law. Thus even if the decreetal amount is to be paid by the appellant as mortgagors as per the impugned judgment and decree passed by the first Appellate Court even then, the mortgagees are unable to deliver the possession of the mortgaged property to the appellants and, therefore, the mortgaged property could not be redeemed for the reasons of extinguishment of such rights to the tenant and the amount received in respect thereof by the mortgagees in the year 1968 itself. At this stage, it is required to be noted that the learned advocate, Mr. Parikh has also placed reliance upon the Rule of Damdupat, which is a equitable rule and which debars to the mortgagee to recover any amount of interest in excess of the principal amount due at the relevant point of time.

21. From the aforesaid decisions, it is further revealed that upon coming into force of the Bombay Money Lenders Act, 1946, the Court cannot pass decree of interest of a sum more than principal amount due and granting interest on interest over the principal amount in respect of the mortgage transaction for

arriving at an amount of Rs.1,04,135/- and further granting interest at the rate of 12% p.a. on the said amount in favour of the mortgagees, that too, in absence of mortgaged property in the hands of the mortgagee is not permissible.

22. Therefore this Court is of the view that in absence of availability of mortgaged property for redemption thereof and having received the amount from the tenant under the tenancy law, the mortgagee is either entitled for entire amount of money due or entire property as the case may be but cannot have both i.e. money received from the tenant and inability to deliver back the possession of the mortgaged property. Therefore, this Court is of the view that the first Appellate Court has committed an error of law in absence of money decree in favour of the mortgagees and has also committed an error of law in passing decree of Rs.1,04,135/- with interest at the rate of 12% p.a.

23. Thus in the facts of the present case, present Second Appeal succeeds and is accordingly allowed. The impugned judgment and decree dated 26.09.1989 passed by the Extra Assistant Judge, Ahmedabad (Rural) at Mirzapur in Regular Civil Appeal No.103/1983 is hereby quashed and set aside. Decree to be drawn accordingly.

