

(1940) 08 CAL CK 0020
In the Calcutta High Court
Case No : Suit No. 1605 of 1939

Sm. Kiron Bala Dassi

APPELLANT

Vs

Atul Kristo Basu and Another

RESPONDENT

Date of Decision : 05-08-1940

Acts Referred:

Citation : (1940) 08 CAL CK 0020

Judgement

Panckridge, J.—This suit has been instituted on a simple mortgage dated July 17th, 1933. On that day one Satish Chandra Basu advanced to the Defendants a sum of Rs. 6,000. The security for the advance was premises Nos. 65 and 65/2, Balaram De Street (now known as Nos. 40 and 42, W.C. Banerjee Street). The mortgagee was closely related to the mortgagors, being their first cousin. By the Bengali deed of mortgage the mortgagors stated that they charged the property as a first mortgage and promised to repay the amount within twelve years from the date of the deed and to pay interest on the principal sum at the rate of six per cent per annum up to the day of realisation, payment to be made every month. The deed goes on these words:

If for any reason the interest for six consecutive months falls into arrear at a time then you will be competent to realise the same by filing a suit for the realisation of the principal and interest in a Court of competent jurisdiction, But be it known that you will not be competent to sue for the principal amount within twelve years if the monthly interest be paid regularly.

During the life-time of the mortgagee the interest was regularly paid, but difficulties have arisen since the mortgagee's death which occurred on January 23rd, 1939. The mortgagee left as his sole heir, his widow, the Plaintiff, he also left an unmarried daughter and a widowed mother. It is a fact that when this suit was instituted on August 10th, 1939, no interest had been paid to the Plaintiff since her husband's death. She accordingly claims that the acceleration clause has become operative and that she is now entitled to institute proceedings to bring the property to sale.

2. In the written statement the Defendants allege that the consideration money for the mortgage was not the mortgagee's money but the money belonging to the mother of the mortgagee for whom he acted as a benamdar. This allegation has now been abandoned or, at any rate, the Defendants"

3. Counsel has considered that he cannot rely upon it to resist the Plaintiff's claim. The alternative defence is that the suit is premature on the ground that in the events that have happened, the acceleration clause has not become operative. The Defendants put their case in these words:

After the death of Satish Chandra Bose the Plaintiff and the mother of the said Satish Chandra claimed interest on the said mortgage from the Defendants. The Defendants being very close relations of the Plaintiff and her mother-in-law requested them to settle the matter amongst themselves so that the Defendants may go on paying interest as before. As the Plaintiff failed and neglected to come to any arrangement with her mother-in-law the Defendants on June 28, 1939 by their pleader offered the Plaintiff to pay interest regularly as before, provided the Plaintiff could satisfy them of her competency to collect the said interest and give the Defendants a valid discharge with regard to such payments. The Defendants state that they were at all material times and still are ready and willing to pay interest but they have been prevented from paying the same on account of the wrongful conduct of the Plaintiff.

4. The letter which has been referred to as written by the Defendants* pleader on June 28th, 1939, makes the Defendants' position somewhat more clear, because the pleader states that his clients request the Plaintiff to receive the interest due on the mortgage on taking a proper succession certificate from a competent Court. The Defendants' contention, therefore, amounts to this, that they were relieved from the obligation of paying interest until such time as the Plaintiff saw fit to obtain a succession certificate under Part X of the Indian Succession Act. The situation certainly seems to inflict what may justly be described as a hardship on the Defendants.

5. The position seems to be that when they borrowed the mortgage money they stipulated to have a comparatively lengthy period of redemption of twelve years, because either one or both of them are employees of the Port Commissioners and participate in the Port Commissioners' Provident Fund. Their shares in the Fund will become payable in 1945, which will mean that they will then be able to redeem the mortgage without inconvenience.

6. In a somewhat similar case *Ismailbhai Rahim v. Adam Osman* 42 C.W.N. 1023 (1938), I made the following observations:

Counsel says, very reasonably, that where a creditor dies, the debtor is in this unfortunate position,— he must either take the risk of tendering: to a person who is not entitled to receive the debt, and of a subsequent suit by the deceased creditor's executors or administrators, or he must wait until someone obtains probate or letters of administration, and incur liability to pay additional interest

in the meanwhile.

7. The possibility of the operation of an acceleration clause had not occurred to me when I made those observations. I have come to the conclusion, however, that the Plaintiff must succeed. By sec. 59A of the Transfer of Property Act it is provided that unless otherwise expressly provided, reference in that chapter to mortgagors and mortgagees shall be deemed to include reference to persons deriving title to them respectively. That involves to my mind, that should a mortgagee die the mortgagor is bound to pay the interest to the persons deriving title from the mortgagee.

8. Sec. 214 of the Indian Succession Act does not assist the Defendants because all that that section does is to suspend the power of a representative to enforce payment of a debt by legal proceedings until he has obtained evidence of his representative title. It is clear under the provisions of the Act that the heirs of Hindus do not in cases of intestacy have to take out letters of administration, although to enforce some of their rights under that title either letters of administration or a succession certificate must be obtained.

9. A reference has been made to Pandurang Krishnaji v. Dadabhoy Nowroji ILR 26 Bom, 643 (1902). There a mortgagor gave three months' notice to the mortgagees' executors who had not obtained probate of his intention to redeem. The executors were held to have been dilatory in applying for probate, with the result that the grant did not issue for some time after the expiry of the three months provided in the mortgage deed. The Court held that the Plaintiff could not be compelled to pay interest after the expiry of the three months because the Defendants by failing to obtain probate had not put themselves in a position to reconvey the property on payment of the amount due for principal and interest. Now, to judge from their names, the Defendants in that suit were not Hindus, but Parsees, and obviously where there is a will and executors named in it, considerations arise which do not operate in an intestacy.

10. In my opinion, the Defendants were bound to pay to the Plaintiff the interest as it fell due. The Plaintiff is, therefore, entitled to the ordinary mortgage decree with costs as provided by the mortgage deed. However as the case is one in which the Defendants merit considerable sympathy and as the Plaintiff has acted with unnecessary lack of consideration, I shall exercise my powers under Or. 34, r. 4, sub-r. (2) and extend the time fixed for payment of the amount finally declared due to two years. Certified for two Counsel.