
(1938) 06 CAL CK 0003
In the Calcutta High Court

Sm. Nirupama Devi Lahiri

APPELLANT

Vs

Anathbandhu Saha and Others

RESPONDENT

Date of Decision : 01-06-1938

Acts Referred:

Contract Act, 1872 — Section 23

Citation : AIR 1938 Cal 618

Judgement

1. This appeal is on behalf of defendant 1, Sm. Nirupama Devi, in the mortgage suit, out of which this appeal arises, instituted by Anathbandhu Saha, the mortgagee, against her and three other defendants. The mortgage which is sought to be enforced in this suit is dated 20th March 1922 (Ex. 1, paper book, Part 2, p. 8). The mortgagor was Mukundalal Sarkar since deceased, whose heirs are defendants 2 and 3 in the suit. The amount borrowed was Rs. 3000; the rate of interest mentioned in the deed is 14 1/4 per cent. per annum, compound with yearly rests. Three properties were made security for the payment of the loan. On 10th May 1925, defendant 1, the appellant before us, purchased from the mortgagor the third item of property mentioned in the mortgage instrument and another property which is not included in the mortgage bond, at a price of Rs. 9000. [Ex. 2 (b), p. 18], It appears that money was also due to defendant 1 from Mukunda Lal Sarkar on some other transaction and the whole of Rs. 9000 was not paid to the vendor. Defendant 1 deducted out of the said money what was due to her and kept with her for payment to the mortgagee Anathbandhu a sum of Rs. 4425 which was found on calculation to be due to him at the date of her purchase. These facts are recited in the conveyance deed, namely Ex. 2 (b). The agreement between the mortgagor Mukundalal and defendant 1 was that defendant 1 should pay this sum of Rs. 4425 which she kept with her and with it should discharge the mortgage, that is to say should free not only the property which she was purchasing but also the other two properties which were included in the mortgage security. The next transaction which has to be noticed is a transaction on 4th June 1929 : Ex. 2 (a), p. 28. The mortgagee Anathbandhu and his daughter, defendant 4 in the suit, purchased from the mortgagor

property No. 1 included in "the aforesaid mortgage security for a sum of Rs. 3600. "We will examine some of the terms of this conveyance at a later stage to meet one of the two points raised by Mr. Gupta appearing on behalf of the appellant. The plaint of this suit was filed on 10th November 1934. Three prayers, namely (ka), (ga) and (gha), have to be noticed as also Schedule (kha), which is a statement of accounts attached to the plaint. The schedule shows that at the date of the plaint, after making allowances for payments made towards mortgage debts from time to time, a sum of Rs. 9243-11-10 was then due. A claim of Rs. 3243-11-10 was given up and the suit was for the balance, namely Rs. 6000. In the prayer (ka), the plaintiff prays for a preliminary decree for the said sum of Rs. 6000 together with costs and interest at the rate mentioned in the mortgage bond against the property No. 3 of the mortgage, purchased by defendant 1. In the prayer (ga) he claims for a personal decree against defendant 1 for the balance that might be left outstanding after the sale of the said property. Prayer (gha) is an alternative prayer. The plaintiff says that if in the decision of the Court all the three mortgaged properties be held to be liable then the mortgage dues be apportioned on the said three properties and properties Nos. 2 and 3 and part of No. 1 be sold for the amounts so apportioned on the same. This alternative prayer he made, because he himself purchased the equity of redemption in one of the properties mortgaged, e. g. half-share in property No. 1.

2. The substantial defence which has to be considered by us in view of the contentions raised before us are two in number. The first defence is that property No. 3 which defendant 1 has purchased can only be made liable for the sum of Rs. 4425, the amount which was found due at the date when she took conveyance of the said property from the mortgagor and that on this amount no interest was to be paid. The ground on which this defence has been placed before the lower Court and also before us is this: that after she took the conveyance from the mortgagor there was an agreement between her and the mortgagee, Anathbandhu, that Anathbandhu would take from her gradually a sum of Rs. 4425 which she had retained out of the purchase money payable to Mukunda for the property which she had purchased. This agreement has been denied by the plaintiff and one of the principal points before us is whether this agreement has been established. The second defence which she presses is that even if she is not able to prove the said agreement she is not liable personally to pay the money which may be found due on the mortgage. Her property only can be made liable for the sum which has to be apportioned on it as the mortgage security has been split up by the mortgagee himself purchasing the equity of redemption in one of the three mortgaged properties. The learned Subordinate Judge has held that defendant 1 is not personally liable for any sum that may be found due to the plaintiff; and this part of the judgment of the learned Subordinate Judge has not been challenged before us by the plaintiff, who has filed a memorandum of cross-objections on other points. The learned Subordinate Judge however has found that the properties Nos. 1 and 2 have

been exonerated from the charge created by the aforesaid mortgage and that whatever money may be found due to the plaintiff is to be recovered from property No. 3 only. This part of the judgment has been attacked by Mr. Gupta appearing on behalf of the appellant, defendant 1. The learned Subordinate Judge also has found that defendant 1 had established the agreement pleaded by her, that is to say, the plaintiff had agreed to take gradually but without interest the sum of Rs. 4425. He has how. ever given to the plaintiff interest at the rate of 9 per cent. per annum as reasonable interest from Agrahayan 1332 B. S. on a sum of Rs. 3425 which was arrived at after deducting a sum of Rs. 1000 paid by defendant 1 to the plaintiff on 22nd Agrahayan 1332 B. S. He has awarded this interest on the ground that the plaintiff was entitled to get compensation by reason of his being kept out of the money for a long period. Mr. Gupta has challenged this part of the judgment and decree which has awarded to the plaintiff interest at the said rate of 9 per cent. per annum on the said amount. The memorandum of cross-objections is directed against this part of the judgment and decree, the plaintiff's contention being that the learned Subordinate Judge ought not to have found the agreement alleged by the said defendant to be proved and he ought to have allowed interest at the bond rate on the balance of the mortgage money in terms of the mortgage deed.

3. We will firstly consider this part of the case and would deal with the contention of the appellant as raised in the appeal and of the plaintiff-respondent as raised in the cross objections. On the finding arrived at by the learned Subordinate Judge that the plaintiff agreed to take the sum of Rs. 4425 gradually and without interest in full satisfaction of his claim, the decree of the learned Subordinate Judge awarding the plaintiff interest before suit cannot be justified in view of the decision of the Judicial Committee in AIR 1938 67 (Privy Council) . The finding of the learned Subordinate Judge amounts to this that the stipulation about interest as appear ing in the mortgage instrument was given a go-by, the mortgage dues were settled at Rs. 4425 and the mortgagee agreed to take that sum gradually; and there was no-agreement to pay interest upon the aforesaid sum. The promise to pay the aforesaid sum does not appear in any written instrument. The case therefore does not come within the terms of the Interest Act of 1839. Where there is no stipulation for interest, interest before suit can only be awarded by the Court in its discretion only if a contract to pay a definite sum of money appears in the written instrument. This is one of the essential conditions for applying the Interest Act of 1839. In AIR 1938 67 (Privy Council) their Lordships of the Judicial Committee laid down that such interest cannot be paid, unless there is either express stipulation to-pay interest or if a promise to pay interest can be implied or if the case comes within, the provisions of the Interest Act of 1839. It can also be paid in cases where the subject-matter could be brought within the jurisdiction of Courts of equity on the principles and conditions in which the Courts of equity in England assume jurisdiction.

4. That decision has set at rest the conflict on this point which was prevalent in the decisions of the different High Courts in India and has overruled the position

that such interest could be awarded by way of damages under the provisions of Section 73, Con. tract Act. For the position that interest can be given by way of damages for detention, of money, the proposition as had been formulated by Lord Morris in the decision in *Lala Chhagmal Das v. Brijbhukhan Lal* (1895) 22 IA 199 was relied upon by this. Court in awarding to Ruttanji Ramji interest post diem: see *Bengal Nagpur Ry. Co. Ltd. Vs. Ruttanji Ramji and Others*, . The reversal of the judgment of this Court on this-point by the Judicial Committee in the aforesaid case has taken away the force of Lord Morris' observation in *Lala Chhagmal Das v. Brijbhukhan Lal* (1895) 22 IA 199. If therefore the finding of the, learned Subordinate Judge in this respect be a good finding, there is no answer to Mr. Gupta's contention. By the cross-objections however, the plaintiff has challenged the finding of the learned Subordinate Judge. It is therefore necessary to examine the evidence on which the learned Subordinate Judge has arrived at his finding. We may at once say that we do not consider the finding of the learned Subordinate Judge in this respect to be a sound one.

5. On this part of the case there are two versions. The version of defendant 1 is that shortly before she purchased the property from Mukunda Lal, there was a meeting at her residence between the mortgagee Anathbandhu and the mortgagor Mukunda. At that interview, her husband was also present; but there were no other persons present. In her cross-examination she admits that negotiations on her side were carried on by her husband, the meeting being in a verandah of the house and she was near about inside a room. She did not take any part in the conversations between the parties who were assembled on the verandah, but overheard what they were saying. The statement which she makes on oath is as follows:

Mukunda Lal and Anath Bandhucame together and Anath Bandhu proposed that more than Rs. 5000 was due to him from Mukunda and that he would give up some portion and requested me to give up some portion and to take Mukunda Lal's property. Anath Bandhu told me to take an assignment of Rs. 4425 due to him and to pay off the said money gradually. Mukunda Lal Sarkar said that if I purchased the property, I would be able to pay off the said sum of Rs. 4425 due to Anath Bandhu gradually out of the property. It was settled that I should have to pay no interest on the sum of Rs. 4425 which was settled at the time of my purchase to be paid to the plaintiff.

6. The plaintiff's version is this, that he went to the mortgagor Mukund Lal in Takid for his money and was told by the latter that he had already sold one of the properties to defendant 1 and that defendant 1 would pay him his dues. He therefore went to the house of defendant 1 apparently to verify the statement of Mukunda. There he met Suresh Chandra Lahiri, the husband of defendant 1, who confirmed Mukunda's statement and told him that he would pay interest and the principal. The evidence of the plaintiff comes to this, that there was no agreement in variation of the terms contained in the mortgage instrument. He asked for his money and was told that he would be paid by or on behalf of

defendant 1. That left the terms of the mortgage intact and the property purchased by her is liable under the law to bear interest as stipulated in the mortgage instrument. The purchaser of the equity of redemption, though not personally liable for the mortgage money and the interest thereon is bound by the terms of the mortgage deed. We have accordingly to] determine which of the versions is the true version. The first thing for comment is that defendant 1 has not examined her husband with whom, according to her, the plaintiff carried on negotiations and ultimately entered into an agreement and no explanation has been given why he has not been called on her behalf as a witness. The second circumstance which is of great moment is this, that defendant 1 admittedly made various payments through her officers, Tustu Lal Sarkar and Rajeswar Ojha, to the plaintiff, and all these payments have been endorsed on the back of the mortgage bond in the hand of the said two officers. These endorsements are printed at pages 12 and 13 of the paper book, Part 2. They show that since 22nd Agrahayan 1332 B. S., that is to say about six months after her purchase, she had been paying large amounts to the plaintiff as interest. The total amount which appears to have been paid as interest between 22nd Agrahayan 1332 B. S. and 26th Chaitra 1335 B. S. is Rs. 2400. These entries are inconsistent with the case which she makes in her deposition that at the meeting of which she has spoken there was an express agreement with the plaintiff that no interest was to be paid at all and the mortgage would be discharged by payment of the fixed sum of Rs. 4425. To explain away the effect of these entries she made a case in her written statement that these entries were made by her officers Tustu Lal and Rajeshwar dishonestly and in collusion with the plaintiff. There is not an iota of evidence in support of this case of collusion. The evidence leads us to the conclusion that both these officers are still in the service of defendant 1. Defendant 1 states that she made discovery about the way in which the money sent by her to the plaintiff had been appropriated on the back of the mortgage bond shortly after the institution of the suit. Still she did not dismiss her said two officers. They are still in her service and one of them was seen instructing her pleader in Court at the time when this suit was taken up for trial. In these circumstances we have no hesitation in believing the version of the plaintiff as to what took place at the meeting in the house of defendant 1 between him and her husband. The position therefore is that the stipulation about interest contained in the mortgage instrument was left intact and the plaintiff is entitled to have a decree for interest also on the footing of the express terms as embodied in the bond. We accordingly hold that the decree of the learned Subordinate Judge in this respect ought to be modified and the plaintiff ought to get a decree for the money due to him in terms of the bond, that is to say, the rate of interest and the manner of calculation would have to be in terms of the mortgage bond.

7. There remains the other question raised by Mr. Gupta, namely whether the mortgage dues ought to be distributed on the three properties included in the bond or the whole of it would be realized from property No. 3. It is conceded by Mr. Gupta that as all the parties are before the Court, it would be right to work

out the rights of the parties in this suit. That position is not controverted by Mr. Sen on behalf of the plaintiff. It is therefore necessary to determine what are the rights of the parties. Normally, when the mortgagee is the purchaser of a portion of the equity of redemption, his mortgage dues must be [distributed rateably on the properties included in the mortgage. Normally also if the different properties included in the mortgage passed by transfer to different persons as between the purchasers, there must be a contribution in terms of Section 82, T.P. Act. If there had not been anything else, that is to say no other special circumstance, the mortgage dues would have had to be apportioned on the three properties in proportion of their respective values at the date of the mortgage. But there are special circumstances; and in our judgment those special circumstances bring the case within the principle laid down in the last paragraph of the judgment of the Judicial Committee in AIR 1930 183 (Privy Council) , where their Lordships of the Judicial Committee explained the principle laid down in *Shah Mahommed Abbas v. Mahommed Hamid* (1912) 9 ALJ 499. The position is this : On 10th May 1925, three of Mukunda's properties were charged by the mortgage held by the plaintiff. On that date, Mukunda sold property No. 3 to defendant 1. Defendant 1 [did not pay to Mukunda whole of the price but retained for payment to the mortgagee a sum of money which on calculation was found sufficient to discharge the mortgage, that is to say, to free not only property No. 3 purchased by defendant 1 but the other two properties also. As between Mukunda the mortgagor and defendant 1, there was a contract by which defendant 1 was bound to discharge the mortgage and free properties Nos. 1 and 2 also by payment to the mortgagee of what was really Mukunda's money. In view of this position, Mr. Gupta conceded that the money which would on apportionment fall upon properties Nos. 2 and 3 ought to be borne by defendant 1; that is to say, the liability for the two sums of money which will be apportioned on properties Nos. 2 and 3 ought to be borne by property No. 3 by reason of this contract between defendant 1 and Mukunda, because property No. 2 is in the heirs of Mukunda. But Mr. Gupta says that the plaintiff being the subsequent purchaser of the equity of redemption from Mukunda of property No. 1 cannot take up Mukunda's position and for this purpose he relies on the last but one paragraph of the judgment of the Judicial Committee in AIR 1930 183 (Privy Council) . The question therefore narrows down to this, whether the case we have to decide falls within the principle laid down in the last but one paragraph of the said judgment or the last paragraph thereof. If the benefit of the contract between Mukunda and defendant 1, as evidenced by Ex. 2 (b) by which defendant 1 agreed to free with Mukunda's money properties Nos. 1 and 2 also, has passed to the plaintiff as a subsequent purchaser of property No. 1 from Mukunda on the principle laid down by the Judicial Committee, in that case property No. 3 would alone bear the whole of the money. It is therefore necessary to see whether the benefit of the said contract had passed to the plaintiff. One of the circumstances which in our judgment is material for the purpose of deciding the question is that fact that the plaintiff by his conveyance Ex. 2 (a) from Mukunda did not expressly take property No. 1 subject to encumbrances; the finding is that the

value which he paid for it, Rs. 3600, represented the true value of the property in an unencumbered state. That is a finding of the learned Subordinate Judge and that finding has not been challenged before us. Keeping in view this fact, let us examine the terms of the conveyance by which the plaintiff purchased property No. 1 from Mukunda. That was in the year 1929, as we have already stated : [Ex. 2 (a) at p. 28]. After the usual recitals on which the sale had been settled, the following statement is made by Mukunda in that conveyance:

These properties sold hereby have been mortgaged to only you, Anath Bandhu Saha. Save and except that, I have not mortgaged or encumbered the same in any manner to any one. Nirupama Devi (defendant 1), wife of Suresh Chandra Lahiri of Malanoha, has by virtue of an assignment entered into an agreement to pay the money due under the said mortgage and shall pay off the same; and you Anath Bandhu Saha shall be competent to realize the said money from her.

8. It is quite clear from this passage that the vendor Mukunda intended to sell and the purchaser Anath Bandhu intended to purchase the property No. 1 as free property, that is to say, the meaning of this passage is that property No. 1 was not to contribute towards the mortgage debt, but the person who had purchased property No. 3, namely Nirupama Devi was to discharge the mortgage debt in its entirety. This passage in the conveyance will have to be taken along with the fact that Rs. 3600, the price paid, represented a fair price of the property as unincumbered. We accordingly hold that the benefit of the contract between Mukunda and defendant 1 by which, as evidenced by Ex. 2 (b), the latter agreed to discharge the whole of the mortgage debt, had passed to the plaintiff in his character as purchaser of the property No. 1 from the mortgagor. In this view of the matter, we do hold that for the whole of the debt property No. 3 is liable. The result of our decision is that the cross-objections of respondent 1 are allowed to the extent indicated above and the appeal dismissed. Let a preliminary decree be drawn up in this Court fixing the period of grace three months hence. Interest is to be calculated at the bond rate up to the period of grace and thereafter at six per cent. per annum till realization. The plaintiff-respondent will get his costs in the appeal hearing fee being assessed at 15 gold mohurs. By reason of the valuation of his claim as made by the plaintiff in his plaint and in his memorandum of cross-objections, calculation must proceed on the footing that the amount due to the plaintiff at the date of the institution of his suit was Rs. 5799. The cross-objections filed on behalf of respondents 2 and 3 are not pressed and are accordingly dismissed but without costs.