(1924) 06 AHC CK 0046

Allahabad High Court

Case No: None

Mehdi Hasan and Others		APPELLANT
	Vs	
Ismail Hasan		RESPONDENT

Date of Decision: June 12, 1924

Acts Referred:

- Contract Act, 1872 - Section 73

Citation: (1924) ILR (All) 897

Hon'ble Judges: Mukerji, J; Dalal, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Mukerji and Dalal, JJ.
The suit out of which this appeal has arisen was originally instituted by Saiyid Mehdi Hasan, respondent No. 1, for the redemption of a mortgaged property and for the recovery of the surplus usufruct realized by the mortgagee. In the course of the trial other plaintiffs were added mainly because the original plaintiff''s property had been transferred to them.

2. The original mortgagor was one Muhammad Zahur Hasan, whose son is the plaintiff No. 1, and whose widow was the defendant No. 5. The original mortgagee was one Muhammad Sadiq, whose descendants are the defendants Nos. 1 to 4. The other defendants are subsequent transferees.

3. The original mortgage was made for the sum of Rs. 5,500. It appears that at the date of the mortgage, which is the 17th of February, 1895, the properties mortgaged, nine "in number, were all held by prior mortgagees. It was agreed. ;that the mortgagee, Muhammad Sadiq, should advance a sum of Rs. 900 in cash and should keep the balance of the consideration money to redeem the prior mortgages. It was also agreed that till the mortgages were redeemed, the mortgagee, Muhammad Sadiq, should recover from the prior'' mortgagees sums of

money payable by them to the mortgagor on account of certain stipulations contained in the mortgage-deeds. It appears that the prior mortgages were in the shape; of zar-i-peshgi leases, by which the mortgagees advanced a sum of money and agreed to take a part of the usufruct of the property to compensate them for the money advanced and to pay to the mortgagor a portion of the usufruct. It was this portion that was originally payable to the mortgagor and was made payable to Muhammad Saddiq.

4. There is no longer'' any dispute about the original plaintiff''s right to redeem. The lower court has decreed the suit, and has granted a decree for Rs. 13,000 and odd to the plaintiffs as surplus usufruct payable to the mortgagor. A substantial portion of this amount consists of interest.

5. It appears that the mortgagor died shortly after the-mortgage, and his son Mehdi Hasan put as much obstruction'' as possible in the way of Muhammad Sadiq in obtaining'' possession. Muhammad Sadiq had to bring several suits,, it which will be mentioned in detail where necessary, and ultimately he succeeded in recovering a portion of the profits (zar-i-nankar) payable to the mortgagor, and later on, lie succeeded in redeeming three of the nine properties and in '' obtaining possession thereof. It is in respect of these three-villages, namely, Imamnagar, Rahmatpur and Bhainsara,, that the present suit has been brought.

6. Only two points have been argued before us. It has been urged for the defendant No. 1 (appellant) Ismail Hasan-that the lower court was not justified in awarding interest on the surplus amount, and that it was wrong in finding what, was the money actually received by the mortgagee.

7. The account which was prepared in the court below is-printed at pages 28 and 29 of the printed record. It will be noticed that at page 29, in column 1, are the items which the mortgagee is supposed to have received since the execution of the mortgage. We have been told that the mortgagee never received anything out of the property for years prior to 1307 Fasli, and that in 1307 Fasli and in subsequent years, running up to 1311 Fasli, the mortgagee received only a sum of Rs. 176 a year. It is further stated that in the year 1312 Fasli the mortgagee received only a sum of Rs. 376. The learned Subordinate Judge in the account has allowed for the years 1302, 1303 and 1306 Faslis different items as having been received by the mortgagee; and for subsequent years he, has allowed a much larger amount than is admitted by the mortgagee.

8. There is not much of oral evidence in the case. The judgment at page 59 of the printed record will show that the plaintiff, Mehdi Hasan, started denying the title of the mortgagee, Muhammad Sadiq, almost immediately after his father("died. Muhammad Sadiq had accordingly to bring a suit against Mehdi Hasan to obtain a declaration that his mortgage was a valid transaction. In the course of the trial Mehdi Hasan was examined, and he clearly stated that he instituted a" suit against

the prior mortgagee, Muhammad Ali, and he received the money which was payable by him. Again, he said that all the properties which should have been in the possession of the mortgagee were really in his possession and, he was realizing all the profits which were to go to Muhammad Sadiq agreement''. It is clear, therefore, that on the date of the deposition, namely, 26th of September, 1898, Mehdi. Hasan was in possession of all the properties, and the mortgagee, Muhammad Sadiq, had not succeeded at this date in realizing anything. September, 1908, would correspond to 1306 Fasli (agricultural year). Thus it is clear that the first, three items shown at page 29 of the printed record as the receipts by the mortgagee must go.

9. It appears that there was further litigation with the plaintiff. But this did not prevent the mortgagee, Muhammad Sadiq, from suing the previous mortgagees for (sic) and for recovery of zar-i-nankar or profit money which was to go to him under the terms of the lease of 1895. (sic) at page 79 of the printed record shows that Muhammad Sadiq sued the prior mortgagees and obtained a decree for arrears of profits at the rate of Rs. 322-8 (which sum is admittedly the profits recoverable from the villages Bahmat-pur and Bhainsara) for the years Rabi 1308 to Kharif 1311 Fasli. Thus for at least a part of 1308 to a part of 1311 Fasli the mortgagee succeeded in realizing, in the absence of evidence-to the contrary, the money payable to him. It follows that for the years 1308 to 1311 he must be credited with the-leceipt of the profits as shown in the account framed? by the-court below. It is admitted by the mortgagee that for the-years 1307 to 1311 he received a sum of Rs. 176 from the village of Imamnagar. This sum, with Rs. 46, the amount of cess payable by Muhammad Sadiq, would make up the profits from Imamnagar, which are about Rs. 214 a year. If we add this sum to the sum decreed, the full amount debited to him for the years 1308 to 1311 would be debitable against him. There remains the year 1307. There is nothing to show that the mortgagee received anything from the property beyond the sum of Rs. 176 as admitted by him. It was, indeed, the duty of the mortgagor to put the mortgagee in possession, but he-having failed to perform his duty, the mortgagor cannot debit the mortgagee with any amount which is not shown to have been actually received by him. As regards the year 1312, it appears that the mortgagee obtained possession of the villages Bahmatpur and Bhainsara in the year 1904 A.D., that is to say, he actually got possession after the redemption of the property. It is admitted by the parties that the actual profits of the three villages are to be taken at the figure Rs. 950. Thus the lower court was right in debiting the mortgagee with the sum of Rs. 950 from 1312 onwards.

10. The next question is one of interest. The question is whether a mortgagor who sues for redemption is entitled to any interest on the surplus mortgage-money that is found with the mortgagee after the satisfaction of his mortgage. It is admitted (and we have gone through the deed itself) that there is no express stipulation as to payment of any interest on the surplus mortgage-money. There is a stipulation that interest at 12 per cent, per annum would be paid on the money advanced by the mortgagee. The law on the subject would be found in Section 76 of the Transfer of

Property Act (IV of 1882). Sections 72 and 76 lay down the duties of the mortgagee in possession of the mortgaged property, and as to how he is to keep accounts. u/s 72 a mortgagee is given the right to spend money for the preservation of the mortgaged property, for making his own title good against the mortgagor, and so forth, and is permitted to charge interest on the money so expended at the rate of nine per cent, per annum where no interest is fixed to be payable on the principal amount. In Section 76, the mortgagee is directed as to how" he is to keep accounts, and it is mentioned that as against the receipts from the mortgaged property he is to deduct the expenses mentioned in Clauses (c) and (d) and the interest thereon. Further on, it is stated that the surplus, if any, shall be paid to the mortgagor. It is not mentioned that the surplus is to be paid with interest. It does not seem likely that the framers of the Code overlooked the fact that interest might be payable. They made an express mention of the term "interest" in Section 72 and. also in Section 76 itself. So it is not probable that the non-mention of the word " interest " in connection with surplus usufruct was due to any oversight. Coming to cases decided in India, we find that the Bombay High Court, in the case of Janoji v. Janoji ILR 1882 7 Bom. 185, awarded interest on the surplus profits only from the date of the institution of the suit. This was a suit decided in accordance with English practice and Seton on Decrees was quoted. In the English case of Lake v. Bell (1886) L.R. 34 Ch. D. 462 interest was allowed at 4 per cent, from the date of the claim. In the case of Haji Abdul Rahman v. Haji Noor Mahomed ILR 1891 16 Bom. 141 Mr. Justice Telang allowed interest from, the date of the surplus money coming into the hands of the mortgagee. But it was an. entirely different kind of case. In that case the mortgagee exercised his private right of sale given him under the mortgage, and it was on the surplus amount that remained in his hands, after the sale, that the interest was allowed. This case is different in principle from the case reported in ILR 7 Bom. 185, referred to above. In deciding this case the learned Judge purported to follow an English case, namely, Charles v. Jones (1887) L.R. 35 Ch. D. 544. In that case, too, it was on the surplus money that remained in the hands of the mortgagee, after the exercise of the right of private sale, that the interest was allowed. On a consideration of the language of the Transfer of Property Act and on the authorities quoted, we are of opinion that no interest is payable on the surplus mortgage-money till the date of the institution of the suit. The institution of the suit is really a notice to the mortgagee calling upon "him to hand over the surplus money. From that date the mortgagor will be entitled to interest. Before leaving the point, we may mention here that the mortgagor was being paid annually the sum of Rs. 333, and he never told the mortgagee that his money had been paid up out of the usufruct of the property and it was time that he handed over the property to him. It has not been urged before us that interest might, be allowed on the surplus mortgage-money by way of damages. But we have considered the point and we think that it is not proper to allow interest by way of damages. Interest by way of damages can be allowed only u/s 73 of the Contract Act. In most of the cases for redemption usually it is not till an account has been taken that it is discovered on

what date there was a surplus in the hands of the mortgagee. u/s 73 of the Contract Act the party who suffers from a breach of contract is entitled to compensation for any loss or damage caused to him ''thereby. In the case of surplus profits coming into the hands of the mortgagee, it cannot be said that any contract has been broken, especially where there is no express contract. Further, damages can be awarded only when they are not too remote. Only those damages which naturally arise in the usual course of things from such breach can be allowed. It is not in all cases where a sum of money due to one party is in the hands of another that interest may be allowed by way of damages. In a recent'' case decided by us we held that interest could ordinarily be allowed either under the Interest Act or where there is a stipulation. We have quoted authorities for our opinion. We have shown in that case that in every case interest cannot be claimed simply because some money is due. We, therefore, do not think in possible to award interest by way of damages.

11. The result is that the appeal succeeds to the amount of Rs. 6,278-1 interest and Rs. 1,701-12 principal amount. Deducting these two sums from the sum decreed by the court below as surplus amount, the plaintiffs would be entitled to the sum of Rs. 5,914-1. The appeal is allowed as stated above for the sum of Rs. 7,979-13 with proportionate costs to parties.