

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Bindesri Naik v. Ganga Saran Sahu and others, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 8th December 1897.*

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Present:

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The late Bhairon Naik, and his son and heir Bindesri Naik who is the present Appellant, on the 21st August 1875, executed a mortgage, in the form of a conditional sale, in favour of the deceased Debi Parshad, who is now represented by the Respondents Ganga Saran Sahu and Ram Saran Sahu, and of the other Respondent Goshain Moti Gir. By the terms of that deed, the mortgagors acknowledged "that the sum borrowed is Rs. 8,997 in cash of the current coin; that interest shall be paid on this sum at R. 1-8 per cent. per mensem"; and that they had, in lieu thereof, given a conditional mortgage of the entire village of Ramnagra, and of certain other shares of lands (which need not be enumerated) "for a term of two years from this day, engaging to redeem the mortgaged shares by paying the entire amount in a single sum within or at the time stipulated." The deed provided that, if they should fail to pay the principal money at the time stipulated, the mortgage of the shares

should in lieu of that money only be foreclosed; and they should every year pay the interest; and that on default of payment of interest at the end of the year, "the creditors shall be at liberty " to treat it as principal, and to recover it " with interest thereon from our person and our " other property, and also from the property " mortgaged."

By a second deed of mortgage by conditional sale, dated the 3rd May 1876, which recites the previous deed of 21st August 1875, the Appellant and his father borrowed from the same lenders " another sum of Rs. 2,997 of the current coin, " engaging to pay interest thereon at R. 1-8 per " cent. per mensem; that we tack this money on " to the conditions of the former deed-of-mort- " gage by conditional sale, engaging to pay it " with the amount of the said former deed; that " on default of payment of the amount of the " former deed or of this one, according to the " terms of the former deed, the mortgage of the " said shares shall, in lieu of the amount of both " deeds, be foreclosed, and the sale shall become " absolute."

The time of payment stipulated in the first deed, which was made applicable to both, arrived on the 21st August 1877. No payment having been made, the creditors, on the 18th January 1879, presented an application in the Court of the Subordinate Judge of Gorakhpur, praying that at first the usual process of allowing one year's time should be issued to the mortgagors, and that, if they fail to deposit Rs. 21,066. 11. 3, the amount of principal and interest then claimed as due, together with future interest and costs of foreclosure, an order might be passed declaring the mortgage to be foreclosed. The record bears, under the signature of the Judge, that the application was admitted by the present Appellant and his father.

On the 3rd September 1879, the creditors filed an application stating that they had received two sums, together amounting to Rs. 7,452, from two persons, one of whom had purchased the entire village Ramnagra, and the other the 8-anna share of Mauza Tina from the mortgagors. They accordingly prayed that Rs. 7,452 should be deducted from the sum claimed in their original application; that the village Ramnagra and the 8-anna share of Mauza Tina should be exempted from foreclosure; and that the remaining property of the mortgagors should be held liable to foreclosure for the balance of the amount originally claimed by them. The assent of the mortgagors to the application is attested by the signature of the Judge.

After the expiry of the year of grace allowed them for consignment or payment, the mortgagors, between the 4th December 1879 and the 15th May 1886, from time to time presented no less than five incidental petitions to the Court praying for further time. These petitions were, with consent of the creditors applying for foreclosure, confirmed by the Court, and directed to be filed with the foreclosure record. In each of these applications the mortgagors stated the total amount of principal and interest which, at its date, was owing by them under the two mortgage deeds, after deducting the sums paid to account by their vendees. The sum thus stated by them in their last application, on the 15th May 1886, was Rs. 33,444. 7. 6. Upon that occasion, by consent of the creditors, they obtained an extension of time for three months; but they failed, as usual, either to consign or pay within the time allowed them.

On the 12th December 1887, the creditors filed their plaint in this suit, praying either to

have possession on the footing that the prior proceedings had effected a complete foreclosure, or to have the usual foreclosure decree. They claimed that the sum due to them was Rs. 43,450. 11. 6. In answer, the mortgagors filed a written statement, in which they for the first time maintained that the mortgage deeds did not cover interest, at all events beyond the stipulated term of payment, being the 21st August 1877. They did not dispute that, in their repeated applications which have been already referred to, they had constantly admitted and asserted that, under the deeds in question, they were not entitled to redeem, except upon payment of the principal sums, with interest thereon at Rs. 18 per cent. per annum until paid; and that in respect of such admission and assertion they had got an extension of time with the consent of their creditors. But they contended that none of these proceedings in the Subordinate Court of Gorakhpur could be referred to or founded upon, because they had not been registered in terms of Section 17 of Act III. of 1877.

It does not clearly appear whether the Subordinate Judge was of opinion that interest was due under the mortgage deeds, and must be paid in order to avoid foreclosure. Had he been of that opinion, it would have been unnecessary for him to consider the effect of the statements and admissions previously made by the mortgagors in order to obtain delay. He held that registration of such proceedings was not compulsory, and that these admissions must receive effect; but, being of opinion that the creditors had taken an undue advantage of the mortgagors' helplessness, he, upon grounds which he describes as equitable, found that the creditors were only

entitled to simple interest, and allowed the mortgagors to redeem on payment of Rs. 24,990. 15, within six months.

Both parties appealed against that judgment to the High Court at Allahabad. In disposing of the cross appeals, the Court, consisting of Sir John Edge, C.J., and Aikman, J., expressed an opinion that the mortgage bonds did not appear to contemplate the payment of interest *post diem*, that is, after the day upon which it was stipulated that the principal of the loans was to be repaid. But they held that the mortgagors, having, from time to time, obtained extensions of the term of payment, by admissions that interest was included in the amount due, could not confine their creditors to such rights as they would have had under the two mortgage contracts standing by themselves. They held that judicial proceedings did not require to be registered under Act III. of 1877, Section 17; and also that the Subordinate Judge was not justified in finding that an undue advantage had been taken of the mortgagors. They accordingly increased the amount payable for redemption to Rs. 36,492. 12. 3, taking, as the basis of their calculation, the sum of Rs. 33,444. 7. 6, which the mortgagors had admitted to be due on the 15th May 1886.

The only plea urged for the mortgagors in support of this appeal was that founded upon Act III. of 1887, which had been rejected by both Courts below. Their Lordships do not think that, according to the tenor of the mortgage deeds, it was intended that the capital sums should cease to bear interest, upon the arrival of the time stipulated for their payment. The learned Judges in the Courts below appear to have fallen into the error, which was corrected by this Board in "*Mathura Das v. Rajah Narindar Bahadar Pal*" (23, Ind. Ap., 138

of confining their attention to a single passage, instead of taking into consideration the whole provisions of the deeds with respect to interest. In the present case, by the deed of 21st August 1875, the whole conditions and provisions of which are made applicable to both loans, it is stipulated, in general terms, that interest at Rs. 18 per cent. per annum is to run upon the principal sums advanced, without any limitation as to the period of its currency. And it is also stipulated that, in default of punctual payment at the end of each year, the creditors are to be at liberty to treat interest as principal, and to recover it from the mortgaged property. It was therefore, in their Lordships' opinion, unnecessary for the creditors, Respondents in this appeal, to rely upon the admissions made by the mortgagors in the course of the foreclosure proceedings.

Although, in the view which their Lordships take the question whether those proceedings can be founded on, without their having been registered in terms of the Act of 1877, does not necessarily arise in this appeal, they think it right to add that, having heard Counsel fully upon the point, they are satisfied that the provisions of Section 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court.

Their Lordships will, for these reasons, humbly advise Her Majesty to affirm the decrees appealed from, and to dismiss the consolidated appeals with costs.

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