

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Yeo Htean Sew v. Abu Zaffer Koreshee, from the Court of the Recorder of Rangoon ; delivered 24th March 1900.*

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Present at the Hearing :

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

By a mortgage deed dated the 22nd of October 1898 the Respondent in consideration of Rs. 75,000 granted certain lands in Rangoon to the Appellant subject to a proviso for redemption by payment on the 22nd of October 1899 of Rs. 75,000 with interest after the rate of Rs. 10 per cent. per annum computed from the date of the deed and payable as thereafter provided. The mortgagor covenanted with the mortgagee as follows :—

“ 3. That the mortgagor will on the 22nd day of October 1899 pay to the mortgagee the sum of Rs. 75,000 and will also pay interest for the same after the rate of Rs. 10 per cent. per annum computed from the date of these presents “ And if the said sum of Rs. 75,000 shall not be paid on the said 22nd day of October 1899 then the mortgagor will pay “ to the mortgagee interest thereon after the rate aforesaid “ until the same shall be fully paid and satisfied and will pay “ all such interest month by month on the 22nd day of each “ month succeeding that for which it shall become due.

“ 4. That if before the said 22nd day of October 1899 the “ mortgagor shall make default in payment of the interest due “ hereunder for one calendar month after becoming due then “ in that case the principal sum of Rs. 75,000 and interest shall “ thereupon become due and payable.”

On the 13th of January 1899 the mortgagee brought a suit against the mortgagor alleging in his plaint that the mortgagor had only paid Rs. 200 for over two months as interest and thereby failed to comply with the requirement of Clause 4 of the mortgage deed and that the sum of Rs. 76,508 was due for principal and interest on the mortgage and praying for an order to the Defendant to pay that sum on a day to be named by the Court and in default that the mortgaged premises might be sold and the proceeds applied in payment.

The Defendant by his written statement admitted the allegations in the plaint and submitted that the provision in Clause 4 was a penalty which the Plaintiff was not entitled to enforce and that the suit was premature. The suit was tried by the officiating Recorder of Rangoon who on the 16th of May 1899 dismissed it. He held that the provision in Clause 4 did not create a penalty in which their Lordships agree with him but as there was no covenant or stipulation for payment of "mesne interest" by the mortgagor the suit was premature. The mortgagee has appealed and the question to be determined is whether the mortgage deed contains such a covenant.

In Clause 3 the mortgagor covenants that he will on the 22nd of October 1899 pay the principal sum with interest computed from the date of the deed, and if the principal shall not be paid on the 22nd of October 1899 that he will pay interest thereon after the same rate until the principal shall be fully paid. Then follow the words and "will pay *all such interest* month by month on the 22nd day of each month "succeeding that for which it shall become due." According to strictly grammatical construction "such" would refer only to the interest payable after the 22nd of October 1899, but it is capable

of meaning the interest for the previous year covenanted in the first part of the clause to be paid, or it may be considered to mean interest at the rate fixed. If it does not mean the interest in the first part of the clause no part of the first year's interest would be payable until the end of that year although after that time the interest is to be paid month by month. It is not reasonable to suppose that the mortgagee would agree to this. Then the introduction of the word "all" is not without significance. If the concluding words of the clause were meant to apply only to the part which immediately precedes them "all" is unnecessary. Combined with "such" it helps to show what is meant and that the clause should be read as one sentence and not as if the first part is separate from what follows it. Clauses 4 and 9 of the deed support this construction. Clause 4 assumes that there is an obligation to pay interest before the 22nd of October 1899. If there is not there cannot be default before that day in payment of the interest and the clause can have no operation. Clause 9 which provides that if at any time either before or after the 22nd of October 1899 the interest due under the mortgage is in arrear to the extent of Rs. 500 and unpaid for three calendar months after becoming due it shall be lawful for the mortgagee to sell the premises also assumes that there is a covenant to pay interest at some time during the first year otherwise the interest could not be in arrear before the 22nd of October 1899. The construction which their Lordships put upon "all such interest" makes the different clauses in the deed consistent and they are of opinion that the suit ought not to have been dismissed. They will therefore humbly advise Her Majesty to reverse the decree appealed against and to order that upon the Defendant paying to the Plaintiff within six months from the date of Her Majesty's order

the sum of Rs. 75,000 the principal and Rs. 1508 the interest due on the mortgage mentioned in the plaint, together with the costs of this suit in the Recorder's Court as taxed by the Court, and further interest on the said principal at the rate of Rs. 10 per cent. per annum, from the date of institution of suit, viz., 13th January 1899 till payment, the Plaintiff do reconvey to the Defendant the said mortgaged premises free and clear from all incumbrances made by him, and do deliver up to the Defendant all deeds and writings in his custody or power relating thereto; but in default of the Defendant paying to the Plaintiff such principal, interest, costs, and further interest as aforesaid, by the time aforesaid, that the said mortgaged premises be sold, and the money to arise by such sale be paid into Court, to the end that the same may be duly applied in payment of what shall be found due to the Plaintiff for principal, interest, costs, and further interest as aforesaid, and the balance (if any) shall be paid to the Defendant; but if the proceeds of sale shall not be sufficient for the payment in full of such principal, interest, costs, and further interest, then that the Defendant do pay to the Plaintiff the amount of such deficiency with interest thereon at the rate of six per cent. per annum until such payment. The Respondent will pay the costs of this Appeal.

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