

*Special Appeal No. 62 of 1969.*1869  
June 23.

Sitaram Dandekar...	...	...	...	... Appellant.
Ganesh Gokhle ...	...	...	...	... Respondent.

*Mortgage—Interest—Entry by Mortgagee upon default of payment of Interest—Equitable relief.*

The defendant mortgaged certain premises to the plaintiff by a deed of mortgage which contained a condition that the mortgagor should remain in possession so long as the interest was regularly paid. Default in payment of the interest was made, and the mortgagee sued for possession of the mortgaged premises.

Held, that the mortgagor was entitled to equitable relief against the entry of the mortgagee on payment of all arrears of interest, together with interest upon each instalment and costs; and three months' time was allowed to the mortgagor to make such payment.

This was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge at Ratnagiri, in Appeal Suit No. 312 of 1868, amending the decree of Shridhar Narayan, Munsif of Kharepatan.

The plaintiff, Sitaram Dandekar sued for the possession of certain premises which had been mortgaged by the defendant to him. One of the terms of the mortgage was that until default was made in the payment of interest by the defendant he should retain possession of the mortgaged premises. The plaintiff also claimed Rs. 29-7-3, the amount of interest due from the defendant to him.

The defendant answered that he had paid interest for the first year, and that, being desirous of redeeming his property he had then requested the plaintiff to receive what was due to him, at the same time withholding payment of any further interest.

The Munsif decreed that the plaintiff should recover Rs. 199, the amount of the principal, and Rs. 23-14-0, the amount of one year's interest thereon.

The Court of appeal, holding that the plaintiffs suit was not for recovery of principal, gave him a decree for one year's interest only.

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The material portions of the mortgage deed were as follow :—

“The land, as aforesaid, together with all my proprietary rights thereto, is mortgaged to you in consideration of the above sum. I am to pay the assessment on the said land, and to enjoy it on your behalf. I will pay you every year the amount of interest on the said (principal) sum, and take receipt (for the same) from you. If in any year I fail to pay you, before the execution of (usual) lease, the amount of interest due for the previous year, in that year I will make over to you the said land, house,” &c. \* - \*

“Whatever amount may be found due by me to you I will pay you the same ten years from this day, and redeem the mortgaged land.”

The Special Appeal was heard before GIBBS and MELVILL, JJ., on the 28th of June 1869.

*Vishvananh Narayan Mandlik* for the special appellant : The Acting Senior Assistant Judge has not attended to the terms of the mortgage bond. The decision of the High Court in *Sakharam Narasimha Sardesai v. Vithu Lakha Garda* (a) should have been followed. Possession of the land should have been decreed to the plaintiff, and interest and costs should have been awarded. The plaintiff was not bound to receive the money before the expiry of the stipulated period.

*Shantaram Narayan* for the special respondent : The respondent is admitted to be tenant of the appellant, and the interest which he is to pay under the terms of the mortgage bond is in the nature of rent ; a default in the payment of the interest, or as we may call it, rent, is, according to the strict interpretation of the bond, to work a forfeiture ; but as a Court of Equity this Court will always relieve against such a forfeiture : *Timmarsa Puranik v. Badiya* (b) ; *Anadrev Damodar v. Ardesir Hormasji*,

(a) 2 Bom. H. C. Rep. 225, 2nd Ed.

(b) 2 Bom. H. C. Rep. 66, 2nd Ed.

(S. A. No. 100 of 1865), decided on the 22nd of June 1865  
by COUCH and WARDEN, JJ.

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GIBBS, J. (after recapitulating the facts, and tracing the progress of the case), proceeded—

The proviso of redemption in the mortgage bond contains the words “दाहा वर्षाने घईन” *daha varshane ghein*, and Mr. Naylor records an opinion that by virtue of those words the mortgagor could *within* ten years redeem the mortgaged property. In this view he is not correct. In the case of *Sakharam v. Vithu*, cited at the bar on behalf of the appellant, it was held, after a great deal of consideration, that by Hindu as well as by English law, in the absence of circumstances or language indicating a contrary intention, the mortgagor cannot, without the consent of the mortgagee, redeem before the expiration of the period named in the provision for redemption; the principle being that, in the absence of stipulation express or implied to the contrary, the right to redeem and the right to foreclose must be regarded as coextensive. The language expressing the proviso for redemption in that case was identical with that used in the present.

It has been urged by Mr. Shantaram that the defendant is entitled to be relieved from the consequences of default in the payment of interest. He contends that the principle laid down in the case of *Timmarsa v. Badiya* should be applied here. In that case it was held that the tenant, upon payment of the costs of the suit, would be relieved from the consequence of a forfeiture for nonpayment of rent at the time stipulated for, in accordance with the practice of the Courts in England and America. Mr. Justice Story, in his work on Equity Jurisprudence, Sec. 1314, page 534, 9th ed., lays down—“The right to relief in equity, in cases of this character is now well established; and the general principle now adopted is, that wherever a penalty is inserted merely to secure a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only

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to secure the due performance thereof, or the damage really incurred by the non-performance." The same learned author further down in Sec. 1316 observes; "The true foundation of the relief in equity in all these cases is, that as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that, in justice, he is entitled to." This doctrine fits in with the case before us exactly. The special respondent mortgaged certain property to the special appellant, and stipulated that he, the special respondent, was to remain in possession on the condition of paying interest on the mortgage debt at stated times and rates; and there was a clause that in case of default the mortgagee was to get possession. This stipulation, we think, comes within the meaning of the words of Mr. Justice Story quoted above. It was in fact made with the sole purpose of securing punctual payment of interest.

We shall therefore amend the decree of the Lower Appellate Court, and direct that the original defendant do pay to the original plaintiff all arrears of interest on the debt, together with interest on each instalment of the same at the rate of 9 per cent. per annum from the date it became due until payment, with costs of this suit throughout, within three months from this date. If the said arrears interest thereon, and costs be not paid within the time aforesaid, the property used for shall be delivered into the possession of the plaintiff, to be held by him under the terms of the mortgage bond.

MELVILL, J., concurred.

*Decree amended.*