

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Aston.

PANDURANG BABU PARAB (ORIGINAL DEFENDANT), APPELLANT, v. 1902.
 MAHADAJI MORESHVAR GOKHALE (ORIGINAL PLAINTIFF), September 8.
 RESPONDENT.*

Mortgage—Redemption—Interest on mortgage-debt—When interest ceases to run—Deposit by mortgagor under section 83 of Transfer of Property Act (IV of 1882)—Duty of mortgagor making such deposit when mortgagee is a minor—Appointment of guardian ad litem—Transfer of Property Act (IV of 1882), sections 84 and 103.

On the 25th October, 1893, the plaintiff passed a mortgage-deed to the defendant, which provided that in case of redemption the mortgagor should pay interest for the whole year in which such redemption should take place. On the 12th October, 1899, the mortgagor, with a view to redeem, deposited in Court, under section 84 of the Transfer of Property Act (IV of 1882), the sum of Rs. 2,000, which was the whole amount due on the mortgage for the then current year ending 24th October, 1899. The mortgagee was then dead, and his son and heir was a minor, and it was therefore necessary that a guardian *ad litem* should be appointed to receive notice of the deposit as required by section 83. Steps were accordingly taken to appoint the minor's mother, and on the 18th November, 1899, she was duly appointed guardian *ad litem*. Notice was then served upon her, calling on her to show cause why she should not receive the deposit. The notice was made returnable on the 9th December, 1899, on which day she refused to accept the deposit, on the ground that it did not include the interest which had accrued due for the year commencing 25th October, 1899. The deposit was consequently returned to the plaintiff, who then filed this suit for redemption. The Subordinate Judge passed a decree directing redemption on payment to the defendant of Rs. 2,000 and also interest for the year commencing 25th October, 1899. The District Judge varied this decree, refusing to give the additional interest, holding that "on making the deposit the plaintiff (mortgagor) had done all that had to be done by him" to enable the defendant to take the deposit out of Court as provided by section 84 of the Transfer of Property Act (IV of 1882) and that therefore interest had ceased to run. On appeal to the High Court,

Held, (reversing the decree) that the defendant (mortgagee) was entitled to the additional interest. The defendant (mortgagee) was a minor. It was therefore requisite that a guardian *ad litem* should be appointed both to receive service of the notice of deposit under section 83 and to take the deposit out of Court. It could not be said that the mortgagor (plaintiff) had completely performed his part until he had procured the appointment of a guardian

1902.

PANDURANG
v.
MAHADAJI.

ad litem for the above purpose. This was not done prior to the 25th October, 1899. Consequently the mortgagee was entitled under the mortgage to the interest for the year commencing on that day.

SECOND appeal from the decision of Mr. T. Walker, District Judge of Ratnágiri, varying the decree of Ráo Sáheb Narayan B. Brahme, Subordinate Judge of Vengurla.

Suit for redemption. On the 25th October, 1893, the plaintiff mortgaged certain property to Baba Krishnaji, the father of the minor defendant, for Rs. 2,000. The mortgage-deed contained the following provision with regard to payment of interest and redemption :

On your aforesaid amount we have agreed to pay you interest at the rate of one *khandi* and ten *maunds* of rice in *kudali* measure per cent. per annum, that is, seven and a half *pharas* of rice. You should appropriate (the said quantity of rice) every year from the income of the mortgaged property till redemption.

For the (redemption of this) mortgage a period of four years is fixed from this date. After the stipulated period we shall pay the whole amount, and the rice for interest of the (whole) year (in which the property will be redeemed) up to this date (that is, the 25th October) will be allowed to be enjoyed by you, and (then) we shall redeem the property.

On the 12th October, 1899, the plaintiff, under section 53 of the Transfer of Property Act (IV of 1882), deposited Rs. 2,000 in Court, stating that all the interest due up to that date had been paid.

At the date of the deposit Baba Krishnaji, the mortgagee, was dead, and his son and heir, the present defendant, being a minor, it was necessary that a guardian should be appointed upon whom the notice of deposit could be served as required by the section. A notice was, therefore, served on the minor defendant's mother Sundrabai, calling upon her to state whether she was willing to act as guardian. This notice was made returnable on the 18th November, 1899. On that day Sundrabai appeared in Court and consented to act. Thereupon notice of the deposit was duly served upon her under section 83 of the Transfer of Property Act. This notice was made returnable on the 9th December, 1899. On that day Sundrabai appeared as guardian and refused to accept the Rs. 2,000 deposit on the ground that, under the terms of the mortgage, interest was due for the year

commencing the 25th October, 1899, and had not been paid. The deposit was thereupon returned to the plaintiff.

The plaintiff then filed the present suit for redemption.

The defendant answered that he did not object to the redemption of the mortgage, provided the plaintiff paid the Rs. 2,000 and interest for the whole year in which the mortgage was redeemed, *i.e.*, the year commencing the 25th October, 1899.

The Subordinate Judge passed a decree ordering payment to the defendant of the principal, Rs. 2,000, and interest for the year commencing 25th October, 1899. Payment to be made on or before the 25th October, 1900, on default right to redeem to be foreclosed.

On appeal by the plaintiff, the Judge varied the decree and directed redemption on payment of the Rs. 2,000. He was of opinion that the plaintiff (mortgagor) who had deposited the Rs. 2,000 in Court on the 12th October, 1899, "had done all that had to be done by him to enable the defendant to take the deposit out of Court," and that under section 84 of the Transfer of Property Act interest on the Rs. 2,000 had ceased to run at the date of deposit.

The defendant appealed to the High Court.

N. M. Samarth for the appellant (defendant):—The defendant has received interest up to the 25th October, 1899, and the question is whether he is entitled to interest for the following year. The plaintiff contends that under section 84 of the Transfer of Property Act interest ceased when he deposited the Rs. 2,000, principal, in Court, the interest then due being paid. That deposit was, no doubt, made on the 12th October, 1899. But the defendant was a minor and no guardian was appointed for him until the 18th November, 1899, and therefore no effective notice of the deposit as required by the section could be given to the defendant until then. But at that date another year had begun and under the terms of the mortgage-deed the defendant had become entitled to claim interest for that year which commenced on the 25th October, 1899. Consequently, the defendant through his guardian was justified in refusing to accept the deposit. Without the further year's interest it was not sufficient to pay off the mortgage-debt. The plaintiff ought to have taken

1902.

PANDURANG
v.
MAHADAJI.

1902.

PANDURANG

v.

MAHADAJI.

steps under section 103 of the Transfer of Property Act to have a guardian *ad litem* appointed for the purpose of receiving the notice of deposit. This should have been done and notice of deposit should have been given to the guardian so appointed before the 25th October, 1899, in order to prevent the accrual of another year's interest. The plaintiff not having done this, he cannot be said to have done all he could have done to enable the defendant as mortgagee to take the deposit out of Court as required by section 84, and therefore interest on the principal debt still continued to run. Notice by the mortgagor to the mortgagee seems to be necessary in order to stop interest: *Sitaramayya v. Venkataramanna*.⁽¹⁾ By section 83 interest is to cease from the date of tender, not from date of deposit. No effective tender was made here. We, therefore, claim interest on the principal for the year commencing 25th October, 1899.

H. C. Coyaji for the respondent (plaintiff):—When the plaintiff deposited the principal money (Rs. 2,000) in Court on the 12th October, 1899, and applied to the Court to issue notice of the deposit to the defendant, he had done all that the law required him to do, and thereupon interest on the mortgage ceased to run under section 84. It is for the mortgagor to deposit the money, but it is for the Court to give notice of deposit. The mortgagor is not responsible for any delay that may take place in giving notice of deposit. The delay might arise from causes wholly beyond his control. Section 103 of the Transfer of Property Act does not make an application for the appointment of a guardian *ad litem* a condition precedent to a valid deposit.

JENKINS, C.J.:—The plaintiff is the mortgagor and the defendant the mortgagee of the plaint property. The mortgage-deed is dated the 25th October, 1893, and it is thereby provided that the mortgagor is not entitled to redeem after the 25th October, 1899, without paying interest to the 25th October, 1900.

On the 12th October, 1899, the plaintiff deposited in Court the Rs. 2,000 then due on the mortgage, but the mortgagee being a

(1) (1888) 11 Mad. 371.

minor the appointment of a guardian *ad litem* for the purpose of receiving notice of the deposit was necessary. Accordingly notice was issued to the minor mortgagee's mother, Sundrabai, with a view to obtaining her consent to be appointed guardian *ad litem* of her son, and it was made returnable on the 18th of November. On that day Sundrabai appeared and was appointed guardian *ad litem*. Then a notice was issued to Sundrabai calling on her to show cause why she should not receive the deposited money, and this was made returnable on the 9th of December. When the matter came on, she refused to accept the money in full discharge of the amount due on the mortgage, inasmuch as it did not include interest subsequent to 25th October, 1899. Thereupon the deposited amount was returned to the plaintiff and this suit was instituted.

The first Court held the deposit under section 83 of the Transfer of Property Act insufficient, and therefore decreed redemption on payment of Rs. 2,171-6-10, ordering that the defendant should recover his costs from the plaintiff. The District Judge on appeal, however, held that the mortgagor had done all that had to be done by him to enable the mortgagee to take the money out of Court, and ordered the plaintiff to pay Rs. 2,000 into Court within six months and redeem the property.

The District Judge has applied the right test; the only question is, whether it has been properly applied. Now it must be noted, that, though section 84 provides that interest shall cease from the date of the *tender*, it does not provide that it shall cease from the date of the *deposit*; in the case of a deposit it only ceases as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of Court, that is to say, he must do something more than make a deposit. We have then to see what additional duty is thus cast on a mortgagor, when the mortgagee is an infant.

Section 103, dealing with the case of a person incompetent to contract, provides that where there is no curator of such person's property, and it is requisite or desirable in the interest of such person that a notice should be served, or a tender or deposit made, application may be made to the Court to appoint a guardian *ad litem* for the purpose of serving or receiving service

1902.

PANDURANG
v.
MAHADAJI.

1902.

PANDURANG

v.

MAHADAJI.

of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts, which could or ought to be done by such person, if he were competent to contract. I pause here for a moment to notice the words *requisite or desirable in the interests of such person*, as it has been suggested that they obscure the meaning of the section. On a fuller consideration I am of opinion that this is not so, and that they are designedly used in reference to distinct events. I will make my meaning plainer by an illustration. If where the *mortgagee* is a minor it is determined by the mortgagor to proceed under sections 83 and 84, then it is *requisite* that a notice should be served; if in the case of an infant mortgagor those entrusted with the care of his affairs consider the mortgage money should be tendered or paid, then it may be *desirable in the interests of* the minor that this should be done. Here it was *requisite* that the notice should be served, for the Act makes the service imperative, and so a guardian *ad litem* had to be appointed both to receive service of the notice and to take the deposit out of Court.

Now for the mortgagor it has been urged by Mr. Coyaji, who has argued the case with his usual clearness and care, that his client had performed his part when on the 12th October he applied for a guardian: that the rest lay with the Court. In support of this view he relies on the frame of section 83, from which it is apparent, he argues, that when the mortgagor has made his deposit, the service of notice is a duty cast on the Court: and yet he concedes that it is manifest from the terms of section 84 that mere deposit does not result in a cessation of interest.

It is desirable to start from some sure basis, and that which suggests itself to me as pertinent to this enquiry is a correct appreciation of the position of a mortgagee. That position in relation to a tender is thus described by Lord Macnaghten in *Bank of New South Wales v. O'Connor*⁽¹⁾: "A mortgagee is entitled to his principal and interest and the ordinary charges and expenses connected with his security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct,

(1) (1859) 14 A. C. 278.

and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably." What we then have to see is how far this position is invaded by sections 83 and 84 of the Transfer of Property Act, bearing in mind that so far as the cessation of interest on tender goes, the provision is but an expression of the general law, while the direction for its cessation in the case of a deposit is an adaptation of an early regulation.

The sole question appears to me to be, whether it was not incumbent on the mortgagor, in the circumstances of this case, not only to apply for a guardian *ad litem*, but also to see that one was appointed. It is clear that for the purposes of a *tender* under this chapter of the Transfer of Property Act it would be incumbent on a mortgagor to procure the appointment of a guardian *ad litem*: till such an appointment had been made there was no one to whom under the Act a tender on behalf of the minor could be made. Does not this furnish us with some clue as to the measure of the mortgagor's duty for the purpose of a *deposit*? I think it does, though I concede that the analogy is not perfect. Until a guardian *ad litem* has been appointed, all has not been done to enable the minor mortgagee to take the money out of Court. Something more remains to be done—the appointment of a guardian *ad litem*. Can the mortgagor claim that he has completely performed his part when he has made his application? Suppose, for example, that the guardian proposed by the mortgagor were to refuse to act, would nothing remain to be done by the mortgagor? Surely it would be incumbent on him to propose some other guardian, because it is his duty, as it would be under section 31 of the Code of Civil Procedure, to see that a guardian *ad litem* is actually appointed, for until then there is no one on whom the requisite notice can be served, or authorized to take the money out of Court. It is true that the language of the Legislature is not specific on this point; but any other view might operate hardly on those, who from personal incapacity cannot protect themselves, whereas a construction that would impose on the mortgagor the duty of seeing that a guardian is appointed involves no practical detriment to him if he acts with prudence. Thus it was open to the

1902.

PANDURANG
v.
MAHADAJI.

1902.

PANDURANG
v.
MAHADAJI.

mortgagor in this case to have moved with sufficient promptness to secure that a guardian should have been appointed in time. I am even inclined to think that he might have made his application for a guardian before depositing his money, for the Act does not dictate any order of sequence, and it is obvious that in the case of an infant mortgagor the application for a guardian must precede the deposit. The whole trouble in this case arises from the fact that the notice in reference to the appointment of a guardian was made returnable at so late a date as the 18th of November. It is much to be regretted that so distant a date should have been fixed, and I think the Courts should strive to dispose of matters of this kind with greater promptness than has been shown in this case.

The balance of convenience appears to me to favour the view that the mortgagor had not done all that had to be done by him until he procured the appointment of a guardian *ad litem*, and where language is not precise, it is permissible to attribute that effect to it which best accords with convenience and justice, for an argument drawn from inconvenience is forcible in law. There is certainly enough of doubt in the language of the Act to permit of the application of this principle. In coming to this conclusion I have not overlooked the arguments based on section 102, but they are, in my opinion, outbalanced by the considerations which have led me to the result I have expressed.

Under these circumstances the decree of the District Judge must be reversed and a decree passed for redemption on payment of additional sums of Rs. 367-11-11 and Rs. 223-1-9, being the amount of costs, together with interest on this latter amount at the rate of 9 per cent. until payment. Respondent to pay costs throughout.

Decree reversed.