

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Ven-  
catavarada Iyengar v. Venkata Lutchma-  
mal and another, from the High Court  
of Judicature at Madras ; delivered Friday  
November 19th, 1874.*

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Present :

SIR JAMES W. COLVILLE.  
SIR BARNES PEACOCK.  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.

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SIR LAWRENCE PEEL.

THE facts of this case material to its decision may be shortly stated. The Defendant entered into a bond with the Plaintiff on the 28th. of December 1867, which is to this effect: The Defendant acknowledges that he had borrowed a sum of 60,000 rupees, which he agreed to pay. He says, "As you have this day paid, and I have " received, in cash this sum of rupees, sixty " thousand, I agree to pay interest thereon at " three-fourths per cent. per mensem, and to " repay the said principal sum in 12 years from " this date," but you, the Plaintiff, are not bound to accept payment even though I tender it, nor can you demand it before that time. Then there is a provision for the payment of the interest which amounts to nine per cent. in three instalments annually, and then there is a mortgage of a certain zemindary of Tiruvur for the purpose of securing the payment of the principal and interest of the bond. There are some further provisions to the effect that the mortgagor is to remain in possession, but that the mortgagee is

entitled to retain some man on the premises to look after his interest, to be paid by the mortgagor. Then at the end there comes this clause:—"If any obstruction be caused either  
" by me or my men in respect of any of the  
" conditions aforesaid, you are competent to give  
" me two months' notice, and if I do not within  
" that term fulfil the conditions entered into  
" with you, to sell by auction by yourself the  
" said Muttah zemindary and all other mort-  
" gaged property or portions thereof, according  
" to your pleasure, to pay yourself at once the  
" principal due to you, and the interest payable  
" on the full amount of principal for the unex-  
" pired portion of the twelve years, and to de-  
" liver to me the remainder, if any." It ap-  
pears that a portion of the interest became in arrear, and that the Plaintiff gave notice in October 1869 of his intention to sell under this power, the Plaintiff supposing that he had the power to sell for the purpose of realizing the principal and the interest up to the end of the 12 years. The Defendant disputed this right of the Plaintiff to sell for that amount on the mere ground of non-payment of interest, which he alleged not to be an obstruction within the meaning of the bond, and it appears that he took measures which stopped the sale, whereupon a further agreement was come to between the parties on the 26th October 1869, the material parts of which are to this effect: At that time there was due the 60,000 rupees and 5,426 rupees for interest, and it was agreed that further interest was to be payable on the principal up to the date of payment. Then there is a further stipulation that the Plaintiff is to deliver to the Defendant all the mortgage documents and a certain note of hand given for 2,500 rupees on account of interest, "that, together with interest

“ thereon, having been included in the aforesaid amount of interest.” Then it goes on to say, “ When as you,” that is the mortgagee, “ proceed to sell lot by lot, the said amounts become fully covered up, you shall not proceed with the sale of the subsequent lots.” It appears that conditions of sale were nearly agreed on between the parties when the Plaintiff insisted upon a condition to the effect that if the sale of all the lots did not realize the full amount, then the sale of all those that had been sold before should be void, and there was also a dispute between them on the question of the Defendant giving security to the Plaintiff in the event of the sale not realizing the full amount of the principal and interest due. The sale did not take place; whereupon the Plaintiff brings this action. This plaint is drawn in a very obscure and ambiguous manner, and it is not very easy to arrive at the effect of it. One construction of it is that the Plaintiff complains of an obstruction of his power of sale by the Defendant, and claims as damages that which he would have realized by the sale if it had taken place, which he contends to be the whole amount of the mortgage money, together with interest, up to the expiration of the 12 years. But it may also be taken as a suit brought under the bond, irrespective of the power of sale, for the purpose of recovering the full amount of the principal and interest for the whole time. The Plaintiff obtained a decree in the Court below for all that he sued for. That decision was modified by the High Court, who thus expressed themselves: “ The present suit can hardly be regarded as a suit for damages occasioned by the obstruction offered by the Defendant to a sale under the power. It appears rather to be founded on the assumption that the Plaintiff may recover by suit and by process of execution what-

“ ever he might have deducted from the proceeds  
“ of a sale made under the power. But the deed  
“ itself does not contain any such stipulation,  
“ and we do not think it should be in such a case  
“ implied.” Then they proceed to say that they  
modify the decree, and give to the Plaintiff  
the principal sum and interest at the stipulated  
rate. From that decision the Plaintiff appeals.

In their Lordships' opinion the decision of the  
first Court was clearly wrong. They are of  
opinion that this clause relating to sale was in  
the nature of a penalty, and that the Defendant  
was not entitled to put up the property for sale,  
and to realize the full amount which he claims,  
namely, interest due up to the expiration of  
the 12 years, upon such default only as has been  
made, namely, default in the payment of interest  
on the mortgage money. What might or might  
not be an obstruction that would authorise such  
a proceeding it is not necessary to determine.

Assuming, then, the suit to be in the form of  
an action for damages, whereby the Plaintiff  
seeks to recover the amount which he could have  
obtained by the sale, their Lordships are of  
opinion that it is not maintainable, and they also  
agree with the High Court that it is not main-  
tainable on the bond itself, inasmuch as no such  
right of action if not expressly given by the  
words of the bond is to be implied from it.  
Their Lordships are therefore clearly of opinion  
that the decision of the first Court was wrong.  
Whether or not the Plaintiff's suit ought to have  
been dismissed is a question not before them  
now, because the High Court have undertaken,  
and their Lordships are far from saying wrongly,  
on the matter coming before them, to do what  
they deemed just between the parties; and there  
is no appeal on the other side against the  
decision of the High Court. Their Lordships  
are therefore in the position of the High Court,

and have to determine what is just between the parties; and they are of opinion that the decree of the High Court does determine this. In fact, towards the end of the case the contention very much narrowed itself. It was contended finally on the part of the Appellant that he was entitled to somewhat more than the High Court had given him, on the ground that by the agreement of the 26th October there was a settlement of account under which he would have obtained some 426 rupees more than the High Court gave him; and it would appear that the High Court have not given to the Plaintiff two sums of 172 and 254 rupees, which he claims respectively as the wages of the man who was to be kept on the property to look after his interest and the interest due on the promissory note before mentioned for interest which was not paid. It would appear that the High Court have not given the Plaintiff those sums, and he contends that he would be entitled to them if he could insist as he does upon this agreement of the 26th October 1869 being an account stated between the parties and an admission of the balance due at that time. But their Lordships have to observe, in the first place, that the plaint is not in any respect framed upon that agreement of the 26th October 1869, but is a plaint praying for principal and interest upon the bond; and it is only upon the hypothesis that it be treated as such a plaint that it is maintainable at all. And, further, it occurs to them to observe that if the High Court have inadvertently omitted to take notice of those items (and their Lordships are far from saying that is so), the proper course on the part of the Plaintiff would have been to have called their attention to it by petition of review, or at all events in some other manner which has not been done. Their Lordships do not think the appeal maintainable on this latter ground.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed, and this Appeal dismissed, with costs.