

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rameswar Koer and another (representatives of Rajkumari Ratan Koer, deceased) v. Syed Mahomed Mehdi Hossein Khan and others (No. 51 of 1894) from the High Court of Judicature at Fort William in Bengal ; delivered 8th July 1898.*

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Present :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The suit in which this appeal is presented is one for the enforcement of a simple mortgage. The Subordinate Judge passed a decree in favour of the Plaintiffs for the sum of Rs. 1,24,239 8 a. and interest at 4 per cent. per annum from the date of the suit to date of realization ; with directions for sale in case of non-payment in six months. Both parties appealed to the High Court on several grounds ; when the High Court varied the decree by ordering 12 per cent. interest instead of 4, and with that exception affirmed it. The Defendant appeals from the High Court decree on grounds of which only two need be considered.

The mortgage bond in question is dated the 9th August 1880. The principal money secured is a lac of rupees to be paid in five years. Interest is to be paid at the rate of R. 1

per cent per mensem, by three equal instalments in the year, each for four months' interest. In default of those payments of interest, the bond provides that the unpaid interest shall be added to capital and bear interest in its turn.

By their plaint the mortgagees claimed Rs. 49,500 interest and Rs. 10,728 compound interest. The sum allowed by the Subordinate Judge is considerably less; but the Defendant contends that it ought to be less still; because the mortgagees have appropriated to another bond called the Gya bond which carries simple interest, divers payments which they should have appropriated to the bond now in suit which carries interest on interest.

The Gya bond is dated 26th March 1881 and is made payable six months later. The Indian Contract Act 1872 follows the ordinary rules of law in providing that when the debtor has omitted to intimate, and when there are no circumstances indicating, to which of several debts a payment is to be applied, the creditor may apply it at his discretion to any debt actually due and payable to him from the debtor. In this case the mortgagor did omit to intimate any intention on the point. Mr. Arathoon contends that there are circumstances indicating that his payments should be applied to the bond in suit. But the only circumstance he can point to is the original reluctance of the mortgagor to pay any compound interest at all. That reluctance was overcome, and it has nothing whatever to do with the appropriation of payments. It is clear that the mortgagees had a right, in the silence of the debtor, to apply to the Gya bond payments made after 26th September 1881 when that bond had fallen due.

One sum however, R. 1,734. 12 a. in amount, is endorsed on the Gya bond as having been paid on a day before the bond fell due.

It is a very small matter because it is only the interest on that sum which is in question. As regards the principal it cannot signify to the mortgagors whether it went in payment of one bond or the other. Still if there were clearly an error it might now be rectified. But it is certain that the specific point was never raised in the Courts below. In her written statement the Defendant who represents the original mortgagor complains that the mortgagees have wrongly made credits to the interest due on other bonds, not that anything had been credited to interest not due. Both in that statement and in her grounds of appeal to the High Court the ground taken by her is that every one of the payments made should have been credited to the bond in suit, not that the earliest payment was distinguishable from the others. The case has been argued in both Courts on grounds applying equally to all the payments, and the Defendant's arguments have been rightly rejected. If the point now made had been made in the Courts below, some answer or explanation might have been forthcoming. Their Lordships are not in a position to deal with it now.

The second ground taken for the appeal is that the High Court have altered the rate of interest after the date of suit from 4 to 12 per cent. The Subordinate Judge evidently considered that the case fell within Section 209 of the Civil Procedure Code, which gives a discretion to the Court in such matters. The High Court founded their Order on Sections 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization. It is pointed out by Mr. Arathoon that though the suit was instituted after the passing of the Transfer Act, the legal

relations of debtor and creditor had arisen before it. Whether that would prevent the application of the Act is disputed, but assuming in the Defendant's favour that it would, the same result must ensue in this case. The discretion given by the Code is a judicial discretion to be exercised on proper judicial grounds. The Legislature has stated what should be the rule in suits of this kind, and the Courts cannot have a better guide to their discretion. No peculiarity has been shown to exist in this case for cutting down the mortgage rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay.

The appeal therefore fails on both the assigned grounds. Their Lordships will humbly advise Her Majesty to dismiss it, and the Appellants must pay the costs.

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