

## ORIGINAL CIVIL.

Before Chaudhuri J.

1915  
Feb. 15.

KUNJA LAL BANERJI

v.

NARSAMBA DEBI.\*

*Damdapat, rule of—Mortgage between Hindus, whether the rule of Damdapat applies to—Transfer of Property Act (IV of 1882) s. 4—Contract Act (IX of 1872) s. 37.*

There is nothing in the Transfer of Property Act (read with the Contract Act) to preclude the rule of Damdapat from applying to mortgages between Hindus.

*Madhwa Sidhanta Onahini Nilhi v. Venkataramanjulu Naidu* (1) not followed.

*In the matter of Hari Lal Mullick* (2), *Nanda Lal Roy v. Dharendra Nath Chakravarti* (3), *Jeevanbai v. Mawrlas Lachmonlals* (4), and *Sundarabai v. Jayavant* (5) referred to.

By an agreement dated the 22nd September 1908 the first defendant, Narsamba Debi, with the knowledge and consent of the second defendant, her husband Gopal Chandar Setty, agreed to sell to the plaintiff the house and premises No. 62-1, Machua Bazar Street in the town of Calcutta for the sum of Rs. 17,000, and on the same day the plaintiff paid to Narsamba Debi the sum of Rs. 8,000 by way of earnest money, the sale to be completed within a year from the 22nd September 1908. It was also further agreed between the parties that if Narsamba Debi should repay the sum of Rs. 8,000 with interest at 12 per cent.

\* Original Civil Suit No. 1039 of 1910.

(1) (1903) I. L. R. 26 Mad. 662. (3) (1913) I. L. R. 40 Calc. 710.

(2) (1906) I. L. R. 33 Calc. 1269. (4) (1910) I. L. R. 35 Bom. 199.

(5) (1899) I. L. R. 24 Bom. 114.

with quarterly rests within a month from the expiry of the time limited for the completion of the conveyance, the plaintiff should not be entitled to claim specific performance of the contract.

On the same date the first defendant with the knowledge and consent of the second defendant, her husband Gopal Chandar Setty, executed a mortgage of the house and premises No. 68-1, Machuabazar Street in the plaintiff's favour.

The defendant failed to repay the sum of Rs. 8,000 within the prescribed time or at all, and the plaintiff called upon her to execute a conveyance in his favour in terms of the agreement. A draft conveyance was duly prepared and approved by the first defendant's attorney, and was subsequently engrossed on the 9th September 1910 for the defendant Narsamba Debi's signature, but she refused to execute it.

The plaintiff filed a suit against the defendants Narsamba Debi and her husband, Gopal Chandar Setty, for specific performance of the contract.

The suit was heard on the 13th May 1913, when a decree was granted in the plaintiff's favor for the specific performance of the agreement. It was also ordered that the matter be referred to the Official Referee to take an account of the money that was paid to the defendant Narsamba Debi by the plaintiff from the date of the mortgage (22nd September 1908) up to the date of the Official Referee's report and also to take an account of the money due on the mortgage upon the basis that Rs. 8,000 should be taken as the amount of principal as upon an adjusted account, and interest thereon be calculated at the rate provided in the mortgage up to the date of the report.

By his report, dated the 28th July 1914, the Official Referee reported that there was due to the plaintiff on the 15th July 1914 upon the mortgage the sum of

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Rs. 8,00) for principal and Rs. 14,263 for interest calculated up to the 15th July 1914 with quarterly rests. He pointed out that the interest far exceeded the principal and disallowed the excess under the rule of Damdupat.

The plaintiff applied for further directions on the report.

*Mr. C. C. Ghose*, for the plaintiff, referred to the following cases in support of his contention that the rule of Damdupat was not applicable to mortgages governed by the Transfer of Property Act: *Madhva Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu* (1) and *In re Hari Lall Mullick* (2).

The defendants did not appear.

*Cur. adv. vult.*

CHAUDHURI J. This matter arises upon a contention raised on behalf of the plaintiff that the rule of Damdupat does not apply to mortgages under the Transfer of Property Act. There was a reference for accounts upon a mortgage decree in this suit in the usual course. Accounts have been taken and the Official Referee has made his report disallowing interest exceeding the amount of principal applying the rule of Damdupat. It was contended before me on the strength of *Madhva Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu* (1), that the rule of Damdupat does not apply. The question has not so far come up for decision in this Court. In *In the matter of Hari Lall Mullick* (2), the point was raised but not decided. It was held in that case that an order admitting a creditor's claim was tantamount to a decree, and as such put an end to the contractual relationship between the parties. The

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(2) (1906) I. L. R. 33 Calc. 1269.

very same principle has been acted upon in the case of *Nanda Lal Roy v. Dhirendra Nath Chakravarti* (1). In the Bombay case of *Jeewanbai v. Manordas Lachmondas* (2), the learned Judge held that the rule of Damdupat was applicable. I find, however, that in that case 26 Madras was not cited. The current of decisions in the Bombay Court has been that the rule of Damdupat does apply: see the case of *Sundarabai v. Jayarant Bhikaji Nadyowda* (3).

In this Court the uniform rule, so far as I know, has been to disallow as between Hindus interest larger than the amount of principal in making up a mortgage account. As a Court of first instance I am not prepared to follow, under the circumstances, the Madras case of *Madhwa Sidhanta* (4). It seems to me that in that case the learned Judges have overlooked the provision of section 4 of the Transfer of Property Act, taken with section 37 of the Contract Act. It is conceded in the Madras case that in the Contract Act provision has been made for the application of the rule of Damdupat. Section 4 of the Transfer of Property Act provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act. I, therefore, confirm the report made by the Referee and disallow the contention raised.

W. M. C.

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Attorney for the first Defendant: *P. N. Sen*

Attorney for the second defendant: *R. C. Hazra.*

(1) (1913) I. L. R. 40 Calc. 710. (3) (1899) I. L. R. 24 Bom. 114.

(2) (1910) I. L. R. 35 Bom. 199, 203. (4) (1903) I. L. R. 26 Mad. 662.

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