

## ORIGINAL CIVIL.

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*Before Mr. Justice Pontifex.*

AUHINDRO BHOOSUN CHATTERJEE v. CHUNNOOLOLL,  
 JOHURRY AND ANOTHER.

1879  
 May 22.

*Mortgage—Suit by Second Mortgagee against Mortgagor and Third Mortgagee—Account.*

In a suit by a second mortgagee against his mortgagor and a third mortgagee, asking for an account and sale,—the Court directed an account to be taken, not only of what was due to the plaintiff, but also of what was due to the third mortgagee.

THIS was a suit by a second mortgagee against the mortgagor and a third mortgagee. It appeared that on the 23rd September 1878, the defendant Chunnoololl Johurry mortgaged certain properties in Calcutta to the plaintiff to secure the repayment of the sum of Rs. 4,000. These properties were, at the time of the mortgage to the plaintiff, under mortgage to one Bolai Doss Mullick, who had then obtained a decree for an account and sale, and the mortgage to the plaintiff was subject to the mortgage in favor of Bolai Doss Mullick, who had not, however, at the time of the institution of the present suit, proceeded to sell the properties, and the plaintiff stated that he had no desire to redeem them from him. After the mortgage to the plaintiff, the defendant Chunnoololl Johurry again mortgaged the properties in question to the defendant Protab Chand Mullick. The plaintiff in the present suit asked for an account and sale of the mortgaged properties if not sold at the instance of Bolai Doss Mullick, and that if they had been sold, then that the plaintiff might be paid out of the surplus.

Mr. *N. Haldar* for the plaintiff.

Mr. *C. C. Dutt* for the defendant Protab Chand Mullick.

The defendant Chunnoololl Johurry did not appear.

PONTIFEX, J. (made the following decree):—Decree for an account of principal and interest due on the mortgage to the

1879  
 AHINDRO  
 BHOOSUN  
 CHATTARJEE  
 v.  
 HUNNOOLLE  
 JOHURKY.

plaintiff, in default of payment the property to be sold and plaintiff to be paid first, after satisfaction of the decree of Bolai Doss Mullick if there is then a surplus, account to be taken of what is due to Protab Chund Mullick, and surplus to be applied for payment of his claim. If property has been sold under previous decree, claims to be satisfied out of surplus.

Attorneys for the plaintiff: Messrs. *Remfrey and Rogers*.

Attorneys for the defendant Protab Chund Mullick: Messrs. *Ghose and Bose*.

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## APPELLATE CIVIL.

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*Before Mr. Justice Jackson and Mr. Justice McDonell.*

1879  
 April 9.

JOHOORY LALL (PLAINTIFF) v. BULLAB LALL (DEFENDANT).\*

*Interest on Arrears of Rent.*

Every arrear of rent, unless it is otherwise provided by an agreement in writing, is liable to bear interest at 12 per cent. from the time when it, or each instalment of it, became due. The discretion which a Court has to refuse interest can only be exercised upon very clear grounds. The mere non-enforcement by a landlord, even for a series of years, of his right to interest upon arrears of rent, does not amount to a waiver of such right.

*Baboo Bussant Coomar Bose* for the appellant.

*Baboo Anund Chunder Bannerjee* for the respondent.

THE facts of this case sufficiently appear from the judgment, which was delivered by

JACKSON, J. (MCDONELL, J., concurring).—The plaintiff sued to recover arrears of rent with interest.

\* Appeal from Appellate Decree, No. 1398 of 1878, against the decree of Baboo Sreenath Roy Bahadoor, Subordinate Judge of Hooghly, dated the 26th April 1878, affirming the decree of Baboo Ashootosh Addy, Munsif of Haripal, dated the 29th September 1877.

The defendant alleged, that he had been accustomed to pay rent to his former zemindar, the Maharaja of Burdwan, without interest, no matter on what date, or how long overdue, the payment might have been made. He denied that he had received notice of the plaintiff's title, that is to say, of the assignment of the mehal to the plaintiff, and he also alleged that he had tendered the amount of rent which was due.

The Munsif found in favor of the plaintiff, and on that point there was no appeal by the defendant; that the latter had notice that he was to pay rent to the plaintiff; also that he had not made any tender or deposit of the rent, but he found that the late zemindar had been accustomed to receive rent without interest, and from this he inferred that the defendant could not be made liable to pay any interest at all. The words of his judgment are these:—"The numbers of dakhillas, produced by the defendant, show that no interest was charged, and the plaintiff failing to produce the copy of judgment (as prayed by him on the 11th of September) to show that the interest was charged all along, the defendant cannot be liable for any interest at all."

From this part of the case the plaintiff appealed, and the appeal was heard by the Subordinate Judge. He says:—"The plaintiff has appealed on the ground that the Munsif was wrong in not allowing interest. That it is discretionary with the Courts to allow or not allow interest has been held by the High Court in several cases." The cases are not cited. "There is also a precedent in Marshall's Reports, page 394, to show that a claim to interest should be held as waived, if no interest has been previously charged. In the present case there is no proof to show that the defendant was charged with interest on any previous occasions. The plaintiff took time to file decrees showing that defendant was made liable to interest on previous occasions, but failed to produce any. Under the circumstances of the case, I think the Munsif reasonably exercised his discretion, and I see no reason to interfere." Accordingly he dismissed the appeal.

Now the law, that is s. 21 of the Rent Act, provides:—"Any instalment of rent which is not paid on or before the day when

1879

MOORY  
LALL  
v.  
DULLAB LALL.

1879  
 JOHOOFFRA  
 LALL  
 v.  
 BULLAB LALL.

the same is payable according to the pottah or engagement, or, if there be no written specification of the time of payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrear of rent under this Act, and unless otherwise provided by written agreement shall be liable to interest at twelve per cent. per annum."

Now no doubt it has been held in some cases by this Court that the Courts have a discretion to allow interest upon overdue arrears of rent, but the rule of law being that the instalment of unpaid rent shall be liable to interest at twelve per cent. the discretion is one which must be exercised upon very clear grounds, and it certainly is no good ground to say that the tenant having failed to make payment of his rent on due date, because his landlord had on previous occasions excused him the payment of interest upon it, therefore he should be absolved from the payment of interest ever afterwards, and that is the effect of the judgment in this case.

The lower Appellate Court refers to a judgment of Sir Barnes Peacock in the case of *Dindoyal Poramanick v. Prankishen Paul Chowdhry* (1). That judgment is very familiar to me, because it was delivered in appeal from a decision passed by me as Judge of Nuddea, and I do not hesitate to say that any one who reads the judgment of Sir Barnes Peacock in that case, and who can read between the lines, will perceive the marks of disapproval with which he accepts the finding of the lower Appellate Court which he had before him. He says:—"It appears to the Court that the question, whether the plaintiff had waived his claim to demand interest, was one of fact, and that the Judge has found that the plaintiff did waive his claim. Our attention has been drawn to a decision of this Court, but that case is not similar to the case before us; for in that case the party averred that he had paid the instalments of rent on the precise dates upon which they fell due and took issue on that point. In that case the Judge did not find a waiver; whereas in this case he does substantially find that the plaintiff may be considered to have waived his

(1) Marshall, 394.

claim to interest. It is true that the kabuliats stipulated for the payment of interest upon all sums not paid on a fixed date, but we find the landlord in this case accepted the sums due on account of principal on successive dates from time to time for a series of ten years without making any demand for interest, and without applying any of the sums paid during the above long period to the discharge of any interest which might be due. The interest in this case was reserved, not as penalty, but as a sum due under a contract, and it is not disputed that a Hindu, by the Hindu law, can give up or waive a portion of his claim verbally. For these reasons, and as the Judge has found as a fact that the plaintiff did waive his claim to interest, we cannot interfere with that decision."

1879  
 JOHONY  
 LALL  
 v.  
 BULLAH LALL.

Now, the older members of the profession will very well recollect that, after that judgment was delivered in 1863, the late Chief Justice had modified his view as to the power of the High Court to interfere in special appeal with findings arrived at by the lower Appellate Court, and that cases in which distinct finding of fact had been arrived at by the lower Appellate Court have been on special appeal reversed. However, accepting this judgment absolutely, it seems quite clear that the present case is distinguishable from that case. The Judge here does not find that the plaintiff had waived his claim to interest. What he says is,—“In the present case there is no proof to show that the defendant was charged with interest on any previous occasions.” That might very well be, and I have no doubt that previously the defendant had the advantage of an indulgent landlord who did not claim interest on his arrears. But even if by any stretch of language or reasoning the Maharaja of Burdwan could be said to have waived his claim to interest, that did not apply to the present landlord, who was very strict in exercising his rights as landlord under the Rent Act, and in the event of an arrear, claiming interest upon it. There was certainly no case of waiver on his part, and it lay on the Courts below to exercise, with reason and on legal grounds, the discretion which this Court has on certain occasions declared lies in them to allow or to withhold interest.

There is a case cited in Master's Edition of the law of Landlord

1879  
 JOHOKRY  
 LALL  
 v.  
 BULLAB LALL.

and Tenant—*Rutty Kunt Bose v. Gungadhur Biswas* (1)—holding that the mere fact that the landlord did not on breach of covenant claim interest, instalment by instalment, for the fractional time that the rent was not paid when due, does not justify the plea that such interest so stipulated for, is not due, nor does it raise the presumption that plaintiff had waived his claim to interest.”

I think now that it would be monstrous to say that the mere omission to claim interest for past years from a tenant, who did not pay his rent on due dates, should be considered a waiver of the right to claim interest for all time.

We think the decision of the lower Appellate Court is erroneous, and that the case should go back to that Court in order that it may consider whether there is any ground for exercising the discretion for withholding interest for the particular arrears due.

*Case remanded.*

## ORIGINAL CIVIL.

*Before Mr. Justice Wilson.*

IN THE MATTER OF SOORENDRO NATH ROY CHOWDHURY.

1879  
 April 9.

*Privilege of Exemption from Arrest—Party to Suit—Summary Procedure—Arrest under Writ of Small Cause Court—Act X of 1877, s. 642.*

The general rule that a party to a suit is protected from arrest upon any civil process, while going to the place of trial, while attending there for the purpose of the cause, and while returning home, applies to a defendant to a suit under the summary procedure sections of the Civil Procedure Code who has not obtained leave to appear and defend, and who, therefore, cannot be heard at the trial. Questions as to the privilege of exemption from arrest, in the case of persons arrested under writs issued from the Small Cause Courts in Calcutta, must be governed by the English law, and not by s. 642 of the Civil Procedure Code. It is not a deviation sufficient to forfeit the privilege if the *shortest* road home is deviated from and a less crowded and more convenient road adopted.

*Wooma Churn Dhole v. Teil* (2) distinguished.

THIS was an application for discharge from custody. It appeared that the arrest took place under the following circum-

(1) Marshall, 40.

(2) 14 B. L. R., App., 13.