We must reverse the decrees of the Courts below and give plaintiff a decree directing the document to be registered under section 77 of the Registration Act. The plaintiff is entitled to her costs in this Court and in the Lower Appellate Court, but we direct that each party pay her and his own costs in the Court of First Instance since this point was not there taken.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

BADI BIBI SAHIBAL AND OTHERS (DEFENDANTS NOS. 1, 3, 5, 6, 7, 15, 16, 18, 39 AND 49), APPELLANTS,

1892. March 18, 21, 22 and 23.

v.

SAMI PILLAI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 13, 43—Res judicata—*Court of jurisdiction competent to try subsequent suit—Suit for interest on a bond waiving right already accrued to sue for principal—Second suit for principal and interest subsequently accrued—Limitation Act—Act XV of* 1877, *sched. II, art.* 116—*Mortgage—Interest* post diem *in absence of covenant—Muhammadan Law—Shares of males and females in subject of* altumga *grant—Hypothecation by gosha women—Rule as to proof of* bona fides.

Certain Muhammadans hypothecated to the plaintiff to secure repayment of a debt, their interest in lands, which had been enfranchised as a personal inam—a claim that the lands constituted the endowment of certain mosques having been rejected at the inam enquiry. The hypothecation deed was executed in 1875 and registered, and it contained the following terms with regard to interest and the repayment of the debt:—"We (the obligors) shall pay interest at 7 per cent. per "annum before the 30th October of each year; we shall pay in full the principal "amount on 30th October 1878 after clearing off the interest and redeem this deed: "should we fail to pay the interest regularly according to the instalments, we shall "at once pay the principal, together with the amount of interest." Default was made in the payment of interest in 1876; and in 1877 the plaintiff sued in a District Munsif's Court for the interest then due, expressly stating in the plaint that he agreed to accept payment of the principal and the subsequent years' interest at the times fixed in the deed, and he obtained a decree as prayed. The plaintiff in 1888 now sued the executants of the above instrument and their heirs and

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* Appeal No. 88 of 1891.

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representatives to recover the principal, together with interest up to date. The Court of First Instance held that the claim for a personal decree was barred by limitation, but passed a decree directing the sale of the hypothecated land in default of payment of the principal, together with interest up to date. On appeal:

Held, (1) that this suit was not barred by Civil Procedure Code, section 43, although the creditor's election not to seek a decree for the full amount in the suit of 1877, had not been communicated to the debtors before that suit;

(2) that since the instrument did not provide for interest *post diem* any claim in the nature of a claim for such interest could be allowed by way of damages only and was not a charge on the land, and in the present case such claim was barred by limitation;

(3) that under the circumstances of the case the rule as to the equality of the shares of males and females in the subject of an *allumga* grant was inapplicable;

(4) that those of the defendants, against whom the District Munsif had wrongly passed a decree in 1877, were not precluded from the right to have their shares in the land exonerated in the present suit;

(5) that two gosha women, who had executed the instrument in conjunction with their son and brother, respectively, were not, under the circumstances, entitled to have their shares exonerated, for want of proof that the transaction had been explained to them. *Ashgar Ali* v. *Delroos Banoo Begum*, I.L.R., 3 Calc., 324, distinguished.

APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in original suit No. 5 of 1888.

Suit to recover principal and interest due on a hypothecation bond, dated 30th October 1875, and executed by defendants Nos. 1 to 11 and the ancestors and predecessors in title of the other defendant to the plaintiff to secure a loan of Rs. 19,000. The principal, together with interest calculated at the contract rate up to the date of suit, and a small sum claimed as having been paid by the plaintiff for kist in respect of the land hypothecated, amounted to Rs. 33,541-6-0. The bond (exhibit A) after the description of the land and the words of hypothecation recited that the principal was borrowed to pay off certain judgment debts, &c., and proceeded as follows:—

"Since we have received this sum of rupees nineteen thousand "as detailed above, we shall pay interest accruing on the said sum "at 7 per cent. per annum from this date within the 30th October "of each year and endorse payment on this. We, or those who "are entitled to our assets and liabilities, shall pay in full the "principal amount stated above on the 30th October 1878 after "clearing off the interest, and redeem this deed and the hypotheca. "Should we fail to pay the interest regularly according to the

"instalments, we shall at once pay in ready money the principal, "together with the amount of interest accruing, irrespective of the "subsequent instalments for payment of the principal amount."

The defendants put the plaintiff to the proof of the bond and of their liability thereunder: and among other defences they pleaded that the lands in question, having been the subject of a religious endowment, were incapable of being hypothecated: the District Judge, finding that they were enfranchised inams, overruled this defence.

They also pleaded limitation, and the District Judge held with regard to this plea, that the claim for a personal decree was barred by limitation.

A question was also raised under Civil Procedure Code, section 43. It appeared that the obligors had made default in the payment of interest on 30th October 1876: in the following year the plaintiff instituted original suit No. 845 of 1877 on the file of the District Munsif of Trichinopoly to recover the amount due on account of interest at that date and obtained a decree. The plaint in that suit contained the following clause:—

"Although it is mentioned in the said document that, if default "be made in the payment of interest even in one year, the whole "amount shall be recovered irrespective of the subsequent instal- "ment, yet as the plaintiff has agreed to receive every year the "interest payable in that year and the principal within the period "stipulated therefor, this suit has been brought only for the "interest of the past one year. Plaintiff has agreed to receive "the subsequent interest and the principal according to the "instalment."

Among the defendants, against whom that decree was passed, were the present defendants Nos. 15 and 16, who now pleaded that their shares in the land were not affected by the hypothecation. It was further pleaded on behalf of defendants Nos. 1 and 5, who were gosha women, that their shares were not validly hypothecated, as they did not understand the nature of the transaction when they executed the instrument in suit. The District Judge overruled the last-mentioned pleas also and in the result passed a decree for Rs. 31,381-6-0 with further interest from the date of the plaint to be recovered from the shares of certain of the defendants (exonerating those of others of the defendants) and dismissed the claim for a personal decree.

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Defendants Nos. 1, 3, 5, 6, 7, 15, 16, 18, 39, and 49 preferred this appeal to the High Court, and the plaintiff filed a memorandum of objections.

Bhashyam Ayyangar for appellants.

Subramanya Ayyar, *Ramachandra Ayyar* and *Rajagopala Ayyar* for respondent.

JUDGMENT.—This is an appeal against the decree of the District Judge of Trichinopoly by some of the defendants Nos. 1, 3, 5 to 7, 15, 16, 18, 39 and 49. The suit was brought by the respondent on the hypothecation bond, exhibit A, dated 30th October 1875, executed to the plaintiff by defendants Nos. 1 to 11 and four others to recover Rs. 33,541-6-0 made up of Rs. 19,000 principal, due under exhibit A, and Rs. 14,934-12-8 interest thereon, together with Rs. 94-8-4, amount of kist paid by the plaintiff in December 1886 and interest thereon. The plaintiff asked for a decree for the above amount on the responsibility of the hypothecated property and also that defendants be held personally liable.

The Judge held the personal remedy to be barred, but passed a decree in plaintiff's favour for Rs. 31,381-6-0 with interest thereon at 7 per cent. per annum from date of plaint to date of payment, *plus* Rs. 94-8-4 and interest thereon at the same rate from December 1886, and directed the sale of the hypothecated property (with certain exceptions) in default of payment.

The first objection argued before us is that the suit was barred by section 43 of the Code of Civil Procedure by reason of original suit, No. 845 of 1877, instituted by plaintiff to recover the first year's interest due under the document A. The document provides that interest accruing on the principal sum of Rs. 19,000 at 7 per cent. per annum shall be paid by the 30th October of each year, that the principal itself shall be repaid on the 30th October 1878, and that, in default of payment regularly each year, the plaintiff shall be at liberty at once to claim payment of the principal and interest in arrears. The first year's interest not having been paid on the 30th October 1876, the suit No. 845 was brought on the 29th October 1877. The plaint therein stated (paragraph 3) that plaintiff had agreed to receive yearly the interest due for each year and the principal at the stipulated time, and that he would accordingly receive the interest for 1877 and 1878 and the principal at the time, stipulated in the

document. The Judge held that the plaintiff having expressly waived his right to claim the principal and interest at once at the date of the former suit had no cause of action to sue for more than the interest then due, and that section 43 of the Code of Civil Procedure was no bar to the present suit.

It is argued before us that no evidence has been adduced to show that plaintiff had, prior to the date of the plaint in the former suit, waived the right he had to sue for the principal as well as the interest, and that the statement in the then plaint, that he was willing to accept the principal and subsequent years' interest at the times originally fixed in exhibit A did not amount to a waiver within the meaning of section 43.

We are unable to accede to this contention. The alternative provision in exhibit A is one that was inserted for the exclusive benefit of the plaintiff. He had, therefore, an option to sue either for the first year's interest only or for the same, together with the principal amount. It was only necessary that he should manifest his intention of waiver by some overt act which could not be recalled. This he did by instituting the suit of 1877, and obtaining the decree for the first year's interest alone, expressly stating in the plaint in that suit that he exercised the option. We are unable to accept the argument for the appellants that in order to save section 43, it was incumbent on the plaintiff to have previously communicated to the defendants the election made by him. The real test appears to us to be not whether the option was exercised with the privity of the defendants, but whether it was so exercised as to determine the plaintiff's *locus penitentiæ*. The first contention must, therefore, be overruled.

It is next contended that the Judge was in error in awarding interest on the principal amount subsequent to the 30th October 1878, as exhibit A does not provide for interest *post diem*. We are of opinion that this contention must prevail. The document contains no provision for the payment of interest after the 30th October 1878. We cannot, therefore, treat the interest claimed for the period subsequent to that date as a charge on the hypothecated property. As observed by Lord Cairns in *Cook* v. *Fowler*(1) "any claim in the nature of a claim for interest after the date up "to which interest was stipulated for would be a claim really not

(1) L.R., 7 H.L., 27.

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"for a stipulated sum and interest but for damages, and then it "would be for the tribunal before which that claim was asserted to "consider the position of the claimant, and the sum which, properly "and under all the circumstances, should be awarded for damages." As was also stated by Lord Selborne in the same case interest is given *post diem* "on the principle not of contract but of damages for the breach of contract." This principle has been followed by the High Courts of Calcutta and Allahabad. *Gudri Koer* v. *Bhubaneswari Coomar Singh* (1) and *Mansab Ali* v. *Gulab Chand*(2). Treating the claim as a claim for damages for failure to pay the principal on the 30th October 1878, we must hold it to be barred under article 116 of schedule II of the Limitation Act.

It is next urged that defendants Nos. 1 and 5 were gosha women, and that there is no evidence to show that the transaction under A was explained to them. Both these defendants admitted the execution of A, and first defendant did not deny her knowledge of its contents. Although they are gosha ladies, they executed the document, the former in conjunction with her son and the latter in conjunction with her brother. We do not, therefore, think that the present case falls within the scope of the Privy Council's decision in the case of *Ashgar Ali* v. *Delroos Banoo Begum*(3). Moreover, we observe that this objection was not taken in the former suit of 1877.

Another contention is that fifth defendant was a minor at the date of exhibit A. She does not appear to have pleaded minority in her written statement or applied for an issue with regard to it. Neither did she appear in the former suit and take this objection. The contention appears to be an attempt to take advantage of a statement made by the plaintiff's second witness in his cross-examination. The witness was called merely to prove his father's signature in the document A, and we are not prepared to attach much importance to the indefinite statement made by him as to fifth defendant's age twelve years prior to this suit. We must, therefore, overrule this objection also.

The next contention is that in computing the shares of thirty-ninth and forty-ninth defendants the Judge has made a mistake. This objection appears to be well founded. The share of thirty-ninth defendant is $\frac{7}{480}$ and that of forty-ninth defendant $\frac{7}{960}$,

(1) I.L.R., 19 Calc., 19. (2) I.L.R., 10 All., 85. (3) I.L.R., 3 Calc., 324.

making together $\frac{21}{960}$ or $\frac{7}{320}$. The contention that as the grant was *altumga*, no distinction ought to be made between males and females in computing their shares, is found to be untenable on referring to the passage in MacNaghten (page 329) on which appellants rely. It is clear from that passage that the rule relied on is applicable in the award of shares to persons entitled to participate in the benefit of an endowment of which the profits alone can be divided, the endowment itself being impartible.

It is clear from exhibit III that though the village was claimed at the inam enquiry as jointly endowed for two mosques, the claim was rejected and the defendant's family enfranchised the village as a personal inam. This contention, therefore, also fails.

The next objection is that the shares of defendants Nos. 15 and 16, who are the brothers of defendants Nos. 39 and 40, should also be exempted from liability for the plaint debts. The mere fact of defendants Nos. 15 and 16 having been parties to the former suit, does not estop them from claiming the exemption in this suit, which the District Munsif had no jurisdiction to entertain. We must, therefore, exonerate their shares which amount to $\frac{55}{960}$ or $\frac{11}{192}$.

It is next urged that the Judge is in error in omitting to exclude the share of the eighteenth defendant from liability for the debt. It is not denied that eighteenth defendant is in possession, and in the absence of proof that he inherited the share in his possession from those who executed the document A, such share ought not to have been made liable for the debt. This share $\frac{1}{192}$ must, therefore, be exempted.

The next contention is that under the lease E the plaintiff received more than what was sufficient to cover the interest for the two years 1876 to 1878, and that the Judge was in error in not ascertaining the actual amount received and giving defendants credit for the excess. There is no evidence to show that the receipts were in excess of the interest. Moreover, the document E does not contemplate any such excess. It is admitted that the first year's receipts were not sufficient to cover the interest for that year, and it appears, from the remark made by the Judge in paragraph 67 of his judgment, that defendants abstained from calling evidence on the point on the understanding that the claim for those two years' interest was to be set off against the receipts. This objection, therefore, also fails.

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It is next urged that defendants are entitled to be credited with two sums,—Rs. 1,000 and Rs. 300—received by the plaintiff. As regards the Rs. 1,000, there is nothing to contradict the plaintiff's evidence that it was received by him prior to the date of exhibit A, and that the amount was deducted in 1873, when a previous bond was executed. As regards the Rs. 300, plaintiff has accounted for only Rs. 200, and for the remaining Rs. 100, credit must be given to the defendants.

The decree of the Lower Court will be modified to the extent indicated above, and the costs of the appeal assessed proportionately.

As regards the memorandum of objections filed by the respondent, it is first argued that there is no reason for exempting the shares of defendants Nos. 39 and 49. Although they intervened in the suit, it is not denied that their relationship to the owners of the village entitles them to shares. This being the case, we cannot allow the objection in the absence of evidence of their having forfeited their shares.

The objection with regard to the revenue sales is not pressed, as the purchasers are not parties to this appeal.

With regard to the remaining objection, it is conceded by defendants' pleader that the kudivaram right of the three persons named in document A in items Nos. 2 to 10 of the plaint schedule was included in the property hypothecated. We shall, therefore, direct that the kudivaram right of the first, third and sixth defendants in the said items be also held liable for the plaint debt.

There will be no order as to the costs of this memorandum of objections.