

and *Mallamma v. Venkappa*(1)). If the Subordinate Judge in his orders in execution of the decree in the previous suit had decided that there was no agreement as alleged, that decision would no doubt have operated as a bar by *res judicata* to this suit which is based upon that agreement. We find, however, that there was no such decision. The agreement was set up simply for the purpose of staying execution until the arrangements under the agreement were ripe for being certified to the Court in adjustment of the decree. The Subordinate Judge proceeded with the execution of the decree, not because he found that there was no agreement, but, on the other hand, because there were disputes as to the nature of the agreement. Neither party applied under section 258 of the Code of Civil Procedure to have an agreement certified, and there was no order under that section. The case of *Guruvayya v. Vudayappa*(2) does not therefore apply.

KRISHNASAMI
 AYYANGAR
 v.
 RANGA
 AYYANGAR.

We must accordingly reverse the decree of the Lower Court and remand the suit for trial according to law in so far as the claim for damages is concerned. The suit as a suit for delivery of lands is dismissed. Costs to abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

NITYANANDA PATNAYUDU AND OTHERS (PLAINTIFFS),
 APPELLANTS,

1897.
 February 5.

v.

SRI RADHA CHERANA DEO AND OTHERS (DEFENDANTS),
 RESPONDENTS.*

Mortgage—Interest 'post diem'—Limitation.

A mortgagee is entitled to interest *post diem*, if there is nothing in the document to indicate that the parties did not intend that interest should be paid after the due date.

APPEAL against the decree of R. H. Shipley, Acting District Judge of Ganjam, in Original Suit No. 40 of 1894.

Suit to recover principal and interest due on a mortgage bond, dated 16th April 1880, and executed by defendants Nos. 1 and 2

(1) I.L.R., 8 Mad., 277.

(2) I.L.R., 18 Mad., 26

* Appeal No. 61 of 1896.

NITYANANDA
PATNAYUDU
v.
SRI RADHA
CHERANA
Deo.

in favour of plaintiffs Nos. 1 and 2, and the father deceased of plaintiff No. 3. The mortgage, omitting parties and parcels, was in the following terms:—

“ On an adjustment of account made this day in respect
“ of the registered deed executed by us and in favour of your
“ father, late Raghunadha Patnayudu Garu, on 26th March 1875,
“ and also the deed executed by us both in favour of Nitya-
“ nanda Patnayudu Garu and Brajuvasi Patnayudu Garu,
“ among you, on 14th June 1879, the amount found due is
“ Rs. 2,453-9-0. This day we have borrowed from you in cash
“ Rs. 46-7-0 on account of our household expenses. For the total
“ Rs. 2,500 (two thousand five hundred rupees) we have executed
“ and given this deed. With interest at Re. 0-12-0 per cent. per
“ mensem, we will pay off the principal and the interest in eight
“ years from this date, in accordance with the terms shown herein
“ below. The interest amount due up to the 15th of Palguna
“ Suddham of each year, we will pay on that full moon date alone.

“ That, and also, if we pay Rs. 300 or any amount less than
“ that on that same date, this we will cause to be credited on the
“ schedule of boundaries hereto annexed. We will not demand
“ counter-interest for the amount we pay for the principal and
“ interest. We will not contend that we have made any payments
“ vouched in any other manner than by having the payment noted
“ on the schedule of boundaries referred to above. If we fail to pay
“ the interest amount due up to the 15th of Palguna Suddham of
“ each year as mentioned above and commit default in respect of the
“ instalment, then, setting aside the interest settled of Re. 0-12-0
“ per cent. per mensem, we will pay interest on the principal from
“ the date of default at the rate of Rs. 1-8-0 per cent. per men-
“ sem. The amount of principal and interest, which shall be found
“ to be due at the end of the eight years' term of this deed, will be
“ paid fully on that fixed date alone by either of us, by means of
“ the mortgaged property and our other property, and the pay-
“ ment will be caused to be entered on the list of boundaries
“ annexed hereto and this deed will be taken back. As security
“ herefor have been mortgaged to you and put in your possession
“ together with their appurtenances the dry land about acres 5-0,
“ and wet lands acres 100-0, total acres 105-0. So until the
“ amount of this deed is discharged, we will not mortgage whether
“ simply or with possession, or sell or do any such thing to any

“other person. We as well as our heirs shall be responsible in this regard. Excepting to you the mortgaged property is not already under mortgage to others for money borrowed from them.”

NITYANANDA
PATNAYODU
v.
SRI RADHA
CHERRANA
DEO.

The following issues were among others raised in the case:—

Is plaintiff's claim time-barred in whole or in part?

Are plaintiffs entitled to interest after the due date as damages or otherwise?

Did defendants make a valid tender to plaintiffs of any sum or sums of money under the suit bond? If so, of how much and under what circumstances?

To what relief are plaintiffs entitled?

The District Judge held that the claim for interest under the document was barred by the three years' rule. He also held that the plaintiffs were entitled apart from the law of limitation to no interest *post diem*. As to this he made *inter alia* the following observations:—

“The plaintiffs' claim *post diem* interest, first as of right, and, secondly, they plead that it is an indulgence which the Court should grant them. So far as the latter point is concerned, I would refuse to allow them any interest between the due date and the date of the plaint. They have waited six years before suing the defendants, they refused to give them any statement of accounts, and I think it is sufficiently clear that they have let the debt run on as long as they dared, merely with a view to harassing the defendants and getting good interest on their money. I am strongly of opinion that they should have immediately, on the expiry of the due date, given defendants notice that as the debt was not paid, the property would be attached. It does not lie with them to plead that they are entitled to damages for money lying idle when it is through their own default that it has lain so long idle.

“As regards the legality of such a claim, there are two cases quoted:—*Badi Bibi Sahibal v. Sami Pillai*(1) and *Gopaludu v. Venkataratnam*(2). From these two rulings, I gather that unless there is a stipulation to pay interest after due date, it cannot be claimed except as damages, and that such stipulation may be express or implied. In the present case I hold that there is no such stipulation. On the contrary, there is a distinct

(1) I.L.R., 18 Mad., 261.

(2) I.L.R., 18 Mad., 175.

NITYANANDA
PATNAYEDU
v.
SRI RADHA
CHERANA
DEO.

“ agreement that the interest and the principal are to be repaid on a certain date by means of the mortgaged, and, if necessary, other property. That is to say, that if the money is not paid on the due date, the mortgagees are to foreclose and recover the debt out of the sale-proceeds of the property. I do not hold it possible to read into this agreement any stipulation regarding *post diem* interest. The *terminus ad quem* is distinctly expressed and no other construction can be put upon the words of the bond. The plaintiff’s claim that the bond makes provision for *post diem* interest is therefore rejected, and as the due date was in the year 1888, any claim for *post diem* interest as damages is barred. I therefore decide the third issue against the plaintiff.

“ I distinguish between principal and interest, I find that the principal, *i.e.*, Rs. 2,500 is not barred. The time bar is 12 years and the suit was brought within time. As to interest, it is a different matter. The last instalment of interest fell due on the 17th April 1888, and the question is whether the time bar is 12 years or 3 years.

“ The pleader for the plaintiff argues that when the due date arrived and neither the balance of interest nor the principal was paid, the two sums principal and interest were merged and became one homogeneous debt. But from this view I dissent. I hold that, for the purpose of considering what the time bar is, the two sums must be kept quite distinct, and this view is corroborated by the plaint itself. In the statement of claim the last item is Rs. 1,429-11 for interest at 9 per cent. per annum from 16th April 1888 to 24th August 1894. This is calculated as the principal of Rs. 2,500, but, if the interest had merged in the principal in the due date, the sum on which *post diem* interest would be calculated would be Rs. 2,500 + Rs. 211-4 + Rs. 3,187-8.

“ The limit within which a suit lies for money payable for interest upon money due is 3 years—Schedule II, article 63, Limitation Act.”

In the result the District Judge passed a decree for the principal only without the interest with the ordinary directions for sale in default of payment.

Plaintiffs preferred this appeal.

Pattabhirama Ayyar for appellants.

Mr. Subramanyam for respondents.

JUDGMENT.—There is nothing in the document to indicate that the parties did not intend that interest should be paid after the expiration of the eight years, within which the principal was to be repaid, and we must, therefore, hold, having regard to the ordinary expectations of parties who enter into transactions of this kind, that it was the intention of the parties in this case that interest should continue to be paid until the liquidation of the debt. This is in accordance, with the principles laid down in the recent Privy Council Case *Mallura Das v. Raja Narindar Bahadur Pal*(1) which is now the authoritative guide on the question of *post diem* interest.

NITYANANDA
PATNAYUDU
v.
SRI RADHA
CHERANA
DEO.

We must allow the appeal with costs in both Courts and modify the decree by allowing interest at the rate of 18 per cent. from the date of default up to 16th April 1888, and thereafter at 9 per cent. per annum up to the date of the Lower Court's decree, and further interest on the whole amount at the rate of 6 per cent. till payment. Credit should be given for the amount paid towards interest by the defendants as found by the District Judge. There will be the usual order for sale in default of payment within six months from this date.

APPELLATE CIVIL.

Before Mr. Justice *Muttusami Ayyar* and Mr. Justice *Wilkinson*.

SANKARAN NARAYANAN (DEFENDANT No. 11), APPELLANT,

v.

ANANTHANARAYANAYAN AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 9), RESPONDENTS.*

1892.
December
23.

Civil Procedure Code—Act XIV of 1882, s. 32—Joinder of parties—Change in character of suit.

In an ejection suit by a landlord against his tenant, the Court should not bring on to the record the person from whom the plaintiff holds the land, nor persons claiming to hold it from a third party, nor such third party.

(1) L.R., 23 I.A., 138.

* Second Appeal No. 1737 of 1891.

In Second Appeals Nos. 658 and 1403 of 1895 preferred against the decree of the Subordinate Judge of Calicut in Appeal Suit No. 417 of 1893 judgment was delivered by DAVIES and BODDAM, JJ., which was as follows:—