APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1903. January 23, 29. February 5. 6, 27. March 9.

MADHWA SIDHANTA ONAHINI NIDHI (PLAINTIFFS), APPELLANTS,

v.

VENKATARAMANJULU NAIDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage—Bond and rental agreement executed on same date and identical in many terms—Effect—One and the same transaction—Obligations to be gathered from both—"Damdupat" Rule—Inapplicability to cases governed by Transfer of Property Act.

By an instrument described as a "possessory mortgage debt bond" which recited that the house described in it was put in the possession of the mortgagee, the mortgagors undertook to clear the mortgage debt by paying Rs. 65-10-0 before the 25th of each month, namely, Rs. 35 for principal and Rs. 30-10-0 for interest, and authorised the mortgagee to let the house, and credit the rent towards the aforesaid principal and interest. The bond further provided that in case the rent derivable from the house should fall short of the amounts payable every month, the mortgagors would themselves pay them on the due dates, and that, in default, they would pay compound interest. In case the amounts payable should not be paid for five months, the mortgagees were to recover the debt from the mortgagors. On the same day the mortgagors, by a separate agreement, rented the house from the mortgagees at a rental of Rs. 30-10-0 per mensem, payable by the 25th of each month with compound interest on the amount of rent; in default at the same rate as that payable under the mortgage bond in case of interest being in default. The lessees also agreed to vacate and deliver up the house to the lessors, or to those who obtained an order from the lessors, within thirty days of being required so to do. Default having been made, the mortgagees sued for the amount due, and, in default, for sale of the mortgaged property:

Held, that the two instruments were executed as parts of one and the same transaction and that the intention was that the rights and obligations of the parties were to be gathered from the provisions of both. Taking the two together, it was clear that the transaction was one entirely of mortgage, with an express covenant to pay the principal and interest in instalments and conferring a power on the mortgagee to take possession of the property mortgaged and apply the usufruct in the discharge of the interest and principal. *Juggeewundas v. Ramdas*, (2 M.I.A., 487), followed.

Also that the clause in the rental agreement as to delivery of the house when required, left no room for doubt that the arrangement was one not binding the

---

* Original Side Appeal No. 14 of 1902, presented against the decree of Mr. Justice Boddam in Original Suit No. 57 of 1901.

mortgagee to enter into possession and liquidate his debt by the usufruct; and the express covenant to pay precluded the mortgage from being taken as a purely usufructuary mortgage as defined by the Transfer of Property Act:

Held, further, that the "Damdupat Rule" is inapplicable to cases of mortgage governed by the Transfer of Property Act. *Ram Kunye* v. *Cally Churn*, (I.L.R., 21 Calc., 841), referred to.

SUIT on a mortgage. The facts, as well as the material portions of the documents, are sufficiently set out in the judgment. Rule 28 of the plaintiffs' society provided: "That if interest due on debts taken from the Nidhi shall fall into arrear for five months, the Secretary shall cause a notice of demand to be served on debtors, which will be charged for at the rate of two annas. And if the demand be not complied with by the end of the following month, proceedings shall forthwith be taken for the recovery of the dues. In the case of loans on jewels, they shall be sold under the provisions of the Contract Act."

The learned Judge, sitting on the Original Side, held that the consideration referred to in the mortgage bond, was given by the plaintiffs to the defendants Nos. 1 to 3; that the mortgage, so far as it was concerned was binding on the defendants Nos. 6 and 7. He said:—"I think the mortgage document purported to be nothing else than a usufructuary mortgage. Possession was given to the plaintiffs according to the deed and no one suggests that they (plaintiffs) did not take possession of it. They chose to let it under a rental agreement to defendants Nos. 1 to 3 and they allowed them to retain possession under that rental agreement all these years, though they were in default from the first. There is no doubt that the premises were worth that rent. We know that because a larger amount was paid for many years by a gentleman who occupied a portion of it. The plaintiffs made no effort to get the rent or to retake possession of the land and let it to others. They did not use their best endeavours to get rent. Therefore they are not entitled to claim any interest as against the defendants Nos. 4 to 9. The mortgage itself gives them no right at all to recover for interest or principal by proceeding against the property. Therefore they have no right to recover in this action which is an action to recover the money as against the defendants Nos. 1 to 7 personally and as against the property by sale. The utmost they could have claimed is to recover rent from the defendants who were their tenants under the rental agreement. They have not

MADHWA SIDHANTA ONABHINI NIDHI v. VENKATA-RAMANJULU NAIDU.

done so. This action is an action based solely on the mortgage and the plaintiffs' Vakil has entirely repudiated the idea that the plaintiffs make any claim at all in this action under the rental agreement, and I do not think therefore that I should be justified in giving them a decree at all."

He considered that the defendants, other than Nos. 1 to 3 and the property, were not liable for the interest on the mortgage amount; and that the defendants, other than Nos. 1 to 3, were not personally liable. In the result, he said:—"The seventh issue is 'To what relief, if any, are the plaintiffs entitled.' If in this action I should think of giving a decree for the plaintiffs, I should certainly do so against defendants Nos. 1 to 3 for the amount of the rent due, together with any compound interest payable under rule 19 limited by rule 28. But as I have said I do not see my way in this action, which is solely based on the mortgage instrument, to give any such decree. *Therefore*, I *must* come to the conclusion that the suit must be dismissed, and it will be dismissed with costs."

Plaintiffs preferred this appeal.

S. Subrahmania Ayyar for appellant.

T. V. Seshagiri Ayyar for eighth respondent.

Sundaram Sastri and *Kumaraswami* for sixth and seventh respondents.

JUDGMENT.—This is a suit brought by a registered Fund called Madhwa Sidhanta Onabhini Nidhi, Limited, for the recovery of Rs. 9,054-3-7 stated to be the balance of principal and interest due under a mortgage of the 1st November 1887 granted in favour of the Nidhi by two brothers Venkataramanjulu Naidu and Venkatarangam Naidu and by a son of the former Venkata-narasimhulu Naidu, defendants Nos. 1 to 3, in the suit and members of an undivided Hindu family and for the sale of the mortgaged property. The said Venkatarangam Naidu's sons are impleaded as defendants Nos. 4 to 7, two of them having been minors at the date of the mortgage and the other two having been born subsequently to that date. The eighth defendant is the representative of one Varadappa Chetti, deceased, to whom the property comprised in the mortgage to the plaintiff was mortgaged by the first two defendants on the 15th May 1889, for the sum of Rs. 3,000. The ninth defendant, Govindappa Razu, is the holder of a third mortgage.

BODDAM, J., who tried the suit, found that the mortgage sued on was executed under circumstances binding upon all the members of the said family but dismissed the suit on the ground that, upon the proper construction of the instruments (exhibits A and F) which passed between the parties, the plaintiff was not entitled to sue for the mortgage money or to ask for the sale of the property.

The plaintiffs appeal, and the contesting respondents are only the sixth, seventh and the eighth defendants. The finding of the learned Judge as to the binding character of the mortgage was not impeached in the argument before us. In proceeding to consider the questions which arise for determination, it is necessary to set out the material portions of those instruments. After describing the situation, etc., of the property mortgaged, viz., a house and ground, and reciting that the property was put in the possession of the mortgagee and explaining how the mortgage amount of Rs. 3,500 was made up, the instrument (exhibit A) which describes itself as a "possessory mortgage debt bond" runs, so far as is necessary for the present purpose, thus:—"For clearing off this debt we bind ourselves to pay to you or to those who may obtain your order, before the 25th of every month Rs. 65-10-0, viz., Rs. 35 for principal and Rs. 30-10-0, being the interest accruing at 14 annas per 100 per mensem. You should let out the aforesaid house for rent and the rent derivable therefrom should be credited every month towards the aforesaid principal and interest. In case the rent derivable from the said house should fall short of the amounts to be paid to you every month, or if no rent should be derived therefrom, we bind ourselves to pay otherwise the amount due for principal and interest, before the 25th of every month. Should we fail so to pay we bind ourselves to pay, as per rule 19 of the aforesaid Nidhi, compound interest at 2 pies per rupee for the amount of interest due for each month. In case we don't pay the amount payable by us for five months on the whole, you shall recover the debt from us as per rule 28 of the aforesaid Nidhi . . . . Counter-interest should be allowed for Rs. 25, or any multiple of Rs. 25, which is paid as per rule 19 of the aforesaid Nidhi."

The provisions of exhibit F are these:—"As we have taken out from you on rent at Rs. 30-10-0 for each month house No. 16 on the northern row of Venkatesa Naidu's street attached to

MADHWA SIDHANTA UNAHINI NIDHI v. VENKATA-RAMANJULU NAIDU.

Triplicane, we or our heirs bind ourselves to pay to you or to those who may obtain your order before the 25th of every month the aforesaid Rs. 30-10-0. If we make default in so paying, we bind ourselves to pay compound interest at 2 pies per rupee per month on the amount of each month in which default is made. If perhaps you require the aforesaid house and bungalow we bind ourselves to deliver it over with the key to you or to those who may obtain your order, after vacating it, within thirty days of your communicating the same."

What transpired under these instruments is as follows:—Notwithstanding the recital in exhibit A that possession was given to the plaintiff, actual possession remained with the mortgagors and this was the footing on which the mortgage of the contesting respondent (eighth defendant) was made (see exhibit VIII). The mortgagors made payments to the mortgagee but neither punctually at the times stated nor in the sums specified in the instruments and the total amount thus paid was Rs. 2,638-11-0 between the years 1887 and 1900, which was appropriated by the mortgagee for interest. Though, in consequence, of the failure of the mortgagors to act up regularly to the terms of their contract they were more than once called upon to quit and deliver possession of the house and ground to the plaintiff, the demand was not complied with. No legal proceedings were, however, taken by the Nidhi against the defendants prior to the institution of this suit and the Nidhi was never allowed to enter into and hold actual possession. The present claim, after credit being given to the payments made to the Nidhi, is for Rs. 3,500 for principal and Rs. 5,548-3-7 for interest, inclusive of compound interest.

Upon these facts, the main points which arise for determination are whether the present suit for the recovery of the mortgage amount and for sale of the mortgaged property in default of payment, is maintainable and whether what is called the *Damdupat* rule is applicable to the case.

The answer to the first question depends on the proper view to be taken of the rights of the parties with reference to the provisions of the instruments quoted above. Notwithstanding that exhibit A alone purports to be the mortgage, while exhibit F purports to be a lease from the mortgagee to the mortgagors of the property mortgaged, was it the intention of the parties that the two instru-

ments should be read together and the character of the transaction determined with reference to the provisions of both; or was it their intention that the instruments should be taken separately and each treated as constituting a distinct and independent transaction? In cases like the present it is, of course, the intention of the parties, irrespective of the mere form of instruments executed between them, that determines their rights (compare *Altaf Ali Khan* v. *Lalta Prasad*(1) and *Jafar Husen* v. *Ranjit Singh*(2)). Now, turning to the instruments and the circumstances of their execution, though no express reference is made in either instrument to the other, yet, it is obvious, that there is an intimate connection between them. They were executed and registered on the same day; the sum of Rs. 30-10-0 made payable as rent under the agreement is the exact sum payable as interest under the mortgage; the date on which the interest is made payable, is the date on which the rent is payable; on default of payment on the due date the interest under the mortgage was to carry compound interest at the rate of 2 pies per rupee per mensem, and the rent if unpaid before that date was also to carry the same rate of interest; lastly, the term used for the interest of 2 pies upon the rent in exhibit F is the same as that used in exhibit A for the interest upon interest, viz., "Thudarvaddi" (compound interest) an expression not appropriate in exhibit F except upon the view that what is spoken of as rent in the agreement was in the contemplation of the parties only interest—and it would not have been viewed as interest, but as principal had exhibit F been an entirely distinct transaction. These striking identities in the provisions of the two instruments clearly point to the view that what purports to be the mortgage is not distinct from what purports to be the lease, that the two instruments were executed as parts of one and the same transaction and that the intention was that the rights and obligations of the parties were to be gathered from the provisions of both. Taking the two together it is clear that the transaction was one entirely of mortgage with an express covenant to pay the principal and interest in instalments, and conferring a power on the mortgagee to take possession of the property mortgaged and apply the usufruct in the discharge of the interest and principal.

(1) I.L.R., 19 All., 496. (2) I.L.R., 21 All., 4.

MADHWA SIDHANTA ONAHINI NIDHI v. VENKATA-RAMANJULU NAIDU.

In this view, the case is completely governed by *Juggeerundas* v. *Ramdas*(1) cited for the plaintiff. The provisions of the deed in question there were: "the profit (or interest) of this money is settled for 12 annas, on these conditions, that the holders of the mortgage are to receive in redemption the whole of the produce of the said village, about Rs. 3,000 or Rs. 3,200, and, after allowing for interest, the remainder will go for liquidating the principal and they shall continue so to receive and appropriate the annual produce until the whole of their demand be liquidated. The risk of collecting the income and of any deficiency in the revenue is on our heads, and we do further declare that the holders of the said mortgage shall station a Mehta (or clerk) of their own in the said village for the purpose of making the collections and we, the mortgagors, so long as this property remains in mortgage, do agree to give him a monthly salary of five rupees and his daily food, so long as we can afford to do so." It was found that the mortgagees had entered into possession by appointing a Mehta and that he collected the incomes for some years and paid them over to the mortgagees, but that subsequently he allowed the mortgagors to receive the rent. The proper construction of the contract as well as the effect of the conduct of the mortgagees in allowing the mortgagors to receive the rent, as between the mortgagee and the mortgagors and as between the mortgagee and persons who stood in the position of puisne incumbrancers is dealt with by the Judicial Committee in the following passage of the judgment:— "If this is a binding contract . . . . binding him (the mortgagee) to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his Mehta was in possession. But their Lordships are of opinion that this is not the true construction of the deed, but that it is merely a power to satisfy himself just as an English mortgagee may by taking possession of the rents and profits of the estate; and, if an English mortgagee chooses to forego the benefit of receiving the rents and profits and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the

(1) 2 M.I.A., 487.

mortgage. The only effect would be when some subsequent incumbrancer came in and he had notice of that claim. In that case, the rule and law of England would be that if after notice he permits the mortgagor to receive the rents and profits he exposes himself to the claim of the second incumbrancer and that is the principle which their Lordships think ought to be applied in the present case."

Now, from what has already been said, it will be seen that the language of the mortgage in the present case is much more express than that of the mortgage in the above case inasmuch as here there is a covenant to pay in unmistakeable terms and the words in exhibit F "If perhaps you require the aforesaid house and bungalow, we bind ourselves to deliver it over with the key to you or to those who may obtain your order after vacating it within thirty days of your communicating the same," leave no room for doubt that the arrangement was one not binding the mortgagee to enter into possession and liquidate his debt by the usufruct. These circumstances make the case the more favourable to the present mortgagee. The express covenant to pay precludes the mortgage being taken as a purely usufructuary mortgage as defined by the Transfer of Property Act (see *Ramayya* v. *Guruva*(1)), and the Nidhi not being a mortgagee bound to enter into possession it was, of course, as open to it to refrain from taking legal proceedings to eject the mortgagors, as to avoid piecemeal litigation in respect of the amount of each instalment of principal and interest as it became due and to pursue the preferable course of enforcing its rights in the form it has now adopted. The liability of the mortgagors to repay the debt to the Nidhi is therefore too clear for further discussion. The question as between the mortgagee and the puisne incumbrancers also is equally clear, since the former, not having taken possession of the mortgaged property, there is no scope for the application of the rule as to a mortgagee in possession being liable to account for the consequences of his wilful default and the doctrine of notice to which frequent reference was made in the argument.

It only remains to deal with the contention that the *Dundupat* rule is applicable here. In the circumstances of this case, it is not necessary to express any opinion upon the general question

(1) I.L.R., 14 Mad., 232.

MADHWA SIDHANTA ONAHINI NIDHI v. VENKATA-RAMANJULU NAIDU.

whether the rule has ever been in force within the limits of the ordinary original jurisdiction of this Court. Assuming that it has been, the point to be determined is whether its operation has been affected by the enactment of the Indian Contract Act or of the Transfer of Property Act. That the former enactment could not be held to have touched the rule in any way is obvious. Of course, section 37 of that Act as to the duty of every promisor to perform his promise is an enactment of the most general character, applicable to all kinds of contracts while the *Damdupat* rule relates only to one description of contracts, viz., those involving payment of interest. Even if there were any apparent conflict between the provisions of the said section and the Hindu Law rule in question such conflict could not be held to affect the latter according to the well-established principles of construction governing cases of such conflict. In point of fact, however, there is no sort of conflict between that section and the rule, since the application of the latter would be covered by the words "unless such performance is excused under the provisions of any other law," in the section.

But, as to the effect of the provisions of the Transfer of Property Act relating to mortgages, upon the rule under consideration, the matter rests on a different footing. Under sections 86 and 88 thereof the mortgagee is entitled to a decree for interest, such interest being made up as contracted for. Compare *Muhammad Imam Ali* v. *Sirdar Hussain*(1). If the amount of interest thus due exceeds the principal, the application of the *Damdupat* rule will clearly derogate from the said provisions of the Act. Now, with reference to these provisions which relate solely to mortgages carrying interest the *Damdupat* rule governing all classes of contracts carrying interest may, we think, well be considered to be an anterior general rule which must give way in favour of the later special rule introduced by statute—*Specialia derogant generalibus*. Section 2, clause (*a*) of the Act, in no way precludes the adoption of this view. No doubt, section 13 of the Statute 37 Geo. III, cap. 142, which, it has been held, warrants the application of the *Damdupat* rule within the original jurisdiction of the High Courts of Calcutta and Bombay is not among the enactments expressly repealed by the Transfer of

(1) L.R., 25 I.A., 161.

Property Act; and if the direction contained in that section to the effect that all matters of contract and dealing between party and party should, where the defendant or both the parties are Hindus, be determined according to the Hindu Law and Usage, is to be construed as an importation bodily of every rule of the Hindu Law of Contract into the statute itself, sections 86 and 88 of the Transfer of Property Act must be construed so as not to conflict with such earlier enactment. But such a construction of the section in question of the English statute is impossible. It only lays down that the law applicable to particular classes of cases is the Hindu Law; and it is not as rules enacted by the Legislature as parts of the statute but as mere rules of Hindu Law that they could have operation in the cases contemplated by the statute.

If, however, the correct view should be that as between the rule of the *Damdupat* and the provisions of the Transfer of Property Act relating to interest to be allowed on mortgages, the former is a special law inasmuch as it applies to contracts by Hindus only and the latter a general law comprising, as it does, mortgages by Hindus as well as others—even then it must be held that the one is abrogated by the other. For, though merely because the provisions of a general Act are not consistent with an earlier rule applicable to special cases only, the former should not be held to repeal the latter by implication, yet such a repeal would follow if it appeared that the earlier rule was present to the mind of the Legislature when it enacted the later general provision inconsistent with it and that the later provision was enacted in circumstances which raise an inference that no exception in favour of the earlier rule was intended (Maxwell on 'Interpretation of Statutes,' third edition, page 250). That such was the case here is made perfectly clear by the concluding words of section 2 and by section 129 of the Act in question. For they show that the question how far the rules of Hindu Law should be saved from being affected by each provision of the Transfer of Property Act inconsistent with those rules, was distinctly before the Legislature and that it decided to save the rules of Hindu Law only in so far as they fell within the purview of the two saving provisions just mentioned.

The *Damdupat* rule not being one so saved, cannot but be held to have been abrogated in respect of mortgages governed by the Transfer of Property Act.

MADHWA SIDHANTA UNNIHINI NIDHI v. VENKATA-RAMANJULU NAIDU.

It is scarcely necessary to say that a different view would involve the startling conclusion that the rule of Hindu Law, which requires no writing in the case of a sale, mortgage, lease or exchange of immoveable property whatever the value of it, is still in force within the ordinary original jurisdiction of the High Courts of Calcutta, Bombay and Madras and render the provisions of the Transfer of Property Act in so far as they require these descriptions of transfers to be effected by writing registered, inapplicable within those limits—a view which no one has yet ventured to suggest.

The conclusion that the *Damdupat* rule is inapplicable to cases of mortgage governed by the Transfer of Property Act is not inconsistent with any of the authorities to which our attention was drawn in the argument since, except in *Ram Kanye* v. *Cally Churn*(1) the present question did not arise, the mortgages having been anterior to the passing of the Transfer of Property Act, and though in *Ram Kanye* v. *Cally Churn*(1) the mortgage was subsequent, the effect of the Act upon the *Damdupat* rule was neither suggested nor considered.

That rule cannot, therefore, be applied in this case and the plaintiffs are entitled to all the interest even if the amount thereof should exceed the principal.

The appeal must be allowed and the decree of the learned Judge reversed, the terms of the decree to be settled on an account being filed by the plaintiff and the eighth defendant.

The case having stood over for the account to be filed—On March 9th, the Court delivered the following further judgment :—The amount due to the plaintiff up to this date is Rs. 8,852-12-0 for principal and interest. There will be a mortgage decree for this amount with costs throughout, including advances made to the guardian of the minor defendants payable on the 15th July next with interest on the principal sum of Rs. 3,500, at 10½ per cent. per annum from this date, to the said date and thereafter at 6 per cent. per annum on the whole amount then due to date of realization. If the mortgaged property is found insufficient there will be a personal decree against the defendants Nos. 1 to 3 and against the family assets in the hands of defendants Nos. 4 to 7 for the balance. If there is any surplus in the sale-proceeds after

---

(1) I.L.R., 21 Calc., 841.

payment to the plaintiff, the amount will be applied in the discharge of the eighth defendant's mortgage amounting, with principal and interest on this date, to Rs. 6,107 as agreed.

MADHWA SIDHANTA ONAHINI NIDHI v. VENKATA-RAMANJULU NAIDU.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

KRISTNASAWMY MUDALIAR (PLAINTIFF), APPELLANT,

v.

OFFICIAL ASSIGNEE OF MADRAS (CLAIMANT), RESPONDENT.*

1903. January 22. February 5.

Civil Procedure Code—Act XIV of 1882, *ss.* 268, 483—*Attachment of money before judgment—Decree—Subsequent insolvency of judgment-debtor—Claim of Official Assignee—Priority of Official Assignee.*

The effect of an attachment under the Code of Civil Procedure is to prevent alienation. It does not confer title. An order of attachment under section 268 only operates so as to give the judgment-creditor certain rights in execution. It does not operate, when those rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment.

The plaintiff in a suit obtained an order for attachment before judgment of a sum of money belonging to the defendant. In due course a decree was obtained, and subsequently to the decree the judgment-debtor was declared an insolvent. The Official Assignee then preferred a claim to the money under attachment, contending that the attachment was of no effect as against him, and asking that it might be set aside:

Held, that the Official Assignee was entitled to the order asked for.

CLAIM petition. On 6th February 1900, the plaintiff in the suit obtained an order under section 483 of the Code of Civil Procedure for the attachment before judgment of a sum of Rs. 40,000 which had been deposited with Messrs. Parry & Co. by the defendant in the suit as security for the performance of his duties as dubash, and a further order under section 268 of the Code restraining the defendant from receiving that sum from Messrs. Parry & Co. and Messrs. Parry & Co. from paying it to the defendant.

---

* Original Side Appeal No. 20 of 1902, presented against the order of Mr. Justice Boddam in Claim in Civil Suit No. 18 of 1900, dated the 11th March 1902.