SECRETARY OF STATE FOR INDIA v. VOLKART BROTHERS

Civil Procedure these appeals will be dismissed with costs. The records will be returned to the Lower Court for any further proceedings that may be necessary in O.S. No. 99 of 1921.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1927, January 6.

RAMALINGAM CHETTIAR (FIRST DEFENDANT), APPELLANT,

v.

A. L. S. P. P. L. SUBRAMANIA CHETTIAR AND OTHERS (PLAINTIFF-DEFENDANTS 2 to 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appeal dismissed—Right of some respondents to urge disputes against other respondents—Power of Court under rule 33—Rule 33, limitation of its applicability—Mortgage bond—Interest at 24 per cent payable in six months—On default 24 per cent compound interest with six-monthly rests, whether penalty.

Rule 33 of Order XLI, Civil Procedure Code, should be limited to cases, where in interfering on behalf of the appellant it becomes necessary to alter the decree in favour of some respondent against other respondents, lest injustice should result; it is only then that the Court should act under the rule.

The rule does not give a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the appeal, without his filing an appeal or memorandum of objections himself.

Rangam Lal v. *Jhandu*, (1912) I.L.R., 34 All., 32 (F.B.); *Gangadhar* v. *Banabashi*, (1915) 22 C.L.J., 390 and *Abjal Majhi* v. *Intu Bepari*, (1915) 22 C.L.J., 394, followed.

A stipulation in a mortgage bond that the principal together with interest at 24 per cent per annum shall be paid in six months' time from the date of the bond, but that, on default of

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* Appeal No. 106 of 1925.

such payment, the principal shall be payable, on demand, with *compound interest at the same* rate, with six-monthly rests, from the date of the bond, is not by way of penalty and should not be relieved against.

Sundar Koer v. *Rai Sham Krishen*, (1907) I.L.R., 34 Calc., 150 (P.C.); *Mulli Chettiar* v. *Veeranna Thevar*, (1921) 41 M.L.J., 470; and *Aziz Khan* v. *Duni Chand*, (1918) 23 C.W.N., 130 (P.C.), relied on.

APPEAL against the decree of R. S. SANKARA AYYAR, Additional Subordinate Judge of Coimbatore, in Original Suit No. 79 of 1924.

C. V. Anantakrishna Ayyar and *K. S. Venkatarama Ayyar* for appellant.

A. Krishnasami Ayyar and *M. Patanjali Sastri* for plaintiff-respondent.

T. R. Ramachandra Ayyar for defendants 2 to 5—Respondents.

After the hearing of the appeal was over, Mr. T. R. Ramachandra Ayyar for respondents 2 to 5 urged his case under Order XLI, rule 33 on behalf of the minor respondents as follows :—

The guardian of the minor respondents did not act properly and represent the case of the minors. There should be re-trial of the case.

[*A. Krishnasami Ayyar* for plaintiff (respondent) objected to the minors being heard as the appeal had been dismissed, and there was no cross-appeal or memo. of objections on behalf of the minor respondents. A suit may have to be brought by the minors, if their guardian acted improperly.]

T. R. Ramachandra Ayyar (continuing).—Order XLI, rule 33, is wide enough to include the present case of the minor respondents in this appeal. A suit may also lie. But this matter can also be urged in this appeal itself. An appeal lies on the ground that the guardian in the lower Court did not act properly in conducting the suit, *Erfanuddin Molla* v. *Badan Sheikh*(1), *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(2), *Jawahar Bano* v. *Shujaat Husain Beg*(3).

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(1) (1919) 51 I.C., 583 (586). (2) (1917) I.L.R., 44 Calc., 759 (P.C.).
(3) (1921) I.L.R., 43 All., 85.

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A. Krishnasami Ayyar for plaintiff-respondent.—Order XLI, rule 33, can be used only in making adjustments as between parties in consequence of the appeal being allowed in whole or in part. It is only a consequential provision: See *Gangadhar* v. *Banabashi*(1), *Abjal Majhi* v. *Intu Bepari*(2). This rule corresponds to Order LVIII, rule 4, in the English Rules of Practice. In England rule 4 gives the rehearing of the whole case, not so in India. Reference was made to *Kshum Chand Bhuturia* v. *Ghane Muhammad Saha*(3), *Rangam Lal* v. *Jhandu*(4), *Shib Chandra* v. *A. C. Dulcken*(5).

JUDGMENT.

KRISHNAN, J.

KRISHNAN, J.—The first point taken in this appeal by the first defendant-appellant is that the arrangement as to interest at 24 per cent per annum amounts to an unconscionable bargain and that in any event the stipulation to pay compound interest at the same rate of 24 per cent with six-monthly rests is one by way of penalty and should be relieved against. It is pointed out that the transaction is a hypothecation and that the property hypothecated forms ample security for the amount borrowed, Rs. 25,000.

No doubt the rate of interest agreed to is high but I am not prepared to say that it is so exceedingly high as in itself to lead to the inference of the bargain being an unconscionable one. There is no evidence of any domination of the will of the debtor by the creditor. The money was borrowed for speculating in cotton and the first defendant apparently expected to make large profits in it and agreed of his own accord to pay the high interest for cash down hoping that he would be able to repay the debt in six months, for that is the due date fixed for repayment in the hypothecation deed. Things did not turn out as he expected; hence the

(1) (1915) 22 C.L.J., 390.
(2) (1915) 22 C.L.J., 394.
(3) (1917) 38 I.C., 361.
(4) (1912) I.L.R., 34 All., 32 (F.B.).
(5) (1918) 28 C.L.J., 123.

trouble. But there was no trace of any undue influence in the bargain. The arrangement to pay compound interest was also a part of the bargain, as the plaintiff as a money lender would be able to earn interest on the interest money due by the first defendant on the hypothecation, if paid to him. He, therefore, naturally stipulated for interest on interest and it was also agreed to by the first defendant. That a stipulation by way of compound interest is not necessarily a penalty has been laid down by the Privy Council in *Sundar Koer* v. *Rai Sham Krishen*(1), see also *Malli Chettiar* v. *Veeranna Tevan*(2). It is true that the rate of 24 per cent compound interest is somewhat excessive especially in a hypothecation. But considering that the Privy Council has granted compound interest at 25 per cent in *Aziz Khan* v. *Duni Chand*(3), I am not prepared to say the mere fact of the rate being somewhat exorbitant will establish that the stipulation is one by way of penalty. There are no other circumstances in favour of the contention of the first defendant. The suggestion that the plaintiff was in the habit of accepting 15 per cent when a debt was repaid even though the stipulated rate was 24 per cent and that therefore in this case also we must hold that the intention was only to collect the lower rate is manifestly untenable. The giving up of a portion of interest was purely a matter of grace in those cases; it cannot be used for construing suit arrangement as meaning 15 per cent for that will be against section 92, Evidence Act. The Subordinate Judge has given some relief by changing the six-monthly into yearly rests and there is no appeal against it. I can see no proper ground for further relieving against the covenant entered into by the first defendant with the

(1) (1907) I.L.R., 34 Calc., 150. (2) (1921) 41 M.L.J., 470.
(3) (1918) 23 C.W.N., 130 (P.C.).

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plaintiff with open eyes. On the evidence in the case I do not consider that the agreement to pay enhanced interest is a penalty.

KRISHNAN, J.

The next point taken is that the repayment of Rs. 16,000 and odd should be credited towards principal and not towards interest as plaintiff has done. If when making the payment the debtor had appropriated his payments towards principal it should have been so appropriated but as he did not do so it was open to the creditor to appropriate towards interest. Section 60 of the Contract Act is clear on the point. The allegation that interest was paid separately from time to time is not proved.

The points taken in the appeal failing, the appeal fails and must be dismissed with costs. At this stage Mr. T. R. Ramachandra Ayyar appearing for respondents 2 to 4, who are the sons of the first defendant, wanted to contend that at any rate so far as his clients were concerned the decree of the lower Court should be altered by exempting their share of the hypothecated property from liability for the decree amount, their contention being that the money lent itself did not belong to the plaintiff but to their mother-in-law and that there was no necessity to borrow any money for a speculative cotton trade and that in any event the agreement to give such an exorbitant rate of interest was entirely without necessity and was not binding on them. It will be seen that what these defendants want to urge is practically an independent appeal which has nothing to do with the result of the appeal by their father. They not having filed any appeal or memo. of objections themselves, the objection was taken that they could not be heard to urge the points proposed to be urged. The objection is a valid one; the decree against them was passed more than one year ago and has now

become final. It is, however, urged by their learned vakil that he is entitled to ask us under Order XLI, rule 33, Civil Procedure Code, to pass such a decree as the lower Court ought to have rightly passed and that he is, therefore, entitled to urge the objections that he proposes to that decree. No doubt the language of rule 33 is somewhat wide but as held by the Calcutta High Court in *Gangadhar* v. *Banabashi*(1), and again *Abjal Majhi* v. *Intu Bepari*(2), the rule should not be construed too widely lest it lead to an abrogation of the rules of the Civil Procedure Code, the Court Fees Act, and the Limitation Act. It should be limited to cases where in interfering on behalf of the appellant it becomes necessary to alter the decree in favour of the respondent or respondents against other respondents, lest injustice result. The illustration shows the scope of the rule, for on the appeal of *K*, the case being decided in his favour, the plaintiff-respondent *A* should be given a decree against respondent *Y* to prevent injustice. The rule cannot be properly read as giving a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the appeal, without his filing an appeal or memo. of objections himself. The same view was accepted by the majority in *Rangam Lal* v. *Jhandu*(3); it is only where in granting relief to the appellant it is essential to re-adjust the decree between the respondents that the Court should act under rule 33. I, therefore, hold that the arguments on the merits by Mr. Ramachandra Ayyar cannot be heard. If, as he says, the Court-officer—guardian, who acted for the minors in the lower Court, did not do his

(1) (1915) 22 C.L.J., 390. (2) (1915) 22 C.L.J., 394.
(3) (1912) I.L.R., 34 All., 32 (F.B.).

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duty and did not represent their case properly, he must take appropriate steps as advised to get the necessary relief.

KRISHNAN, J.

The appeal is dismissed with costs of the plaintiff.

ODGERS, J.

ODGERS, J.—In this case the plaintiff, a Nattukottai Chetti, sued the defendants—who consist of a father and his minor sons (defendants 2–4). The fifth defendant is a lessee of the property hypothecated to the plaintiff as he alleges for necessary purposes. The suit is to recover on this hypothecation which was for Rs. 25,000 (Exhibit A) to be repaid in six months from its date (31st January 1918) at 2 per cent per mensem. In default of payment, the interest was to be compounded half-yearly from the date of the bond to date of payment. The Additional Subordinate Judge decreed the suit but gave the plaintiff compound interest with yearly instead of half-yearly rests. The first defendant appeals to us first on the ground that the rate of interest is excessive. There is no question of section 16 of the Indian Contract Act here—and therefore no question of undue influence or of a person in a position of domination over another. The cases quoted on that point are, therefore, not applicable. Now that the Privy Council has said that compound interest is not by itself a penalty, that should not be relieved against, *Sundar Koer* v. *Rai Sham Krishen*(1). Reliance is placed for the appellant on the ruling in *Venkataramiah Pillai* v. *Subramania Pillai*(2), but this ruling has been disapproved by AYLING, J., and myself in *Malli Chettiar* v. *Veeranna Thevan*(3) and I do not see any reason to reconsider the opinion I formed in the last-mentioned case, where we held that a stipulation to pay compound interest from the date of default at the same rate as

(1) (1907) I.L.R., 34 Calc., 150 (P.C.). (2) (1917) 37 I.C., 799.
(3) (1921) 41 M.L.J., 470.

simple interest is not a penalty within section 74, Contract Act. This is really the case here, as for the first six months (or first year under the decree) the interest would of course be simple, so the date of the bond is really the date of default also in this case. No question of necessity is raised by the appellant here —so the case *Kruthiventi Perraju Garu* v. *Sitaramachandraraju Garu*(1) (to which I was a party) and *Ram Bhujwan* v. *Nathu Ram*(2), have really no bearing on the present. On the other hand the Privy Council allowed 25 per cent compound interest in *Aziz Khan* v. *Dhuni Chand*(3) and 24 per cent which in default was to be compounded was allowed by the Calcutta High Court following the Privy Council ruling in *Ajimuddin Sircar* v. *Rafatulla Mandal*(4).

In my opinion there is no ground for holding the interest in this case to be a penalty. The Court should be cautious in interfering with a contract made between the parties who were as far as we know at arms length and each perfectly independent of the other, and in making another contract for them or relieving a party against the results of his default. It was also said that the rate should be reduced because the plaintiff in some other transactions had not insisted on the full contract rate. This is not a legal argument. The other point is as to the payment of Rs. 16,000 by plaintiff. Was it towards principal or interest? The appellant's vakil complains that only the ledger of plaintiff was produced not the chittas or day books. There is also some story of the plaintiff having maintained a book of his own which was taken away by plaintiff's agent. This was not argued by Mr. C. V. Anantakrishna Ayyar. As to plaintiff's books, they appear to prove the accounts

(1) (1925) 48 M.L.J., 584.
(2) (1923) 44 M.L.J., 615.
(3) (1918) 23 C.W.N., 130 (P.C.).
(4) (1919) 50 I.C., 383.

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set out by plaintiff who was under the circumstances entitled to appropriate the money paid towards interest under section 60 of the Contract Act and the defendant has, we must take it, nothing to put against them. The loan took place in Palladam through an agent of plaintiff whose chief place of business is Devakottai. The point fails. The figures are admitted to be correct. In my opinion the appeal should be dismissed with costs.

In the course of the argument Mr. T. R. Ramachandra Ayyar intervened on behalf of the minors. He alleged that they had not been properly represented in the Court below and that we could and ought to take notice of the fact and to allow the case to be re-opened and re-argued on their behalf. I presume it is intended to argue that the father had no right to bind the minors' interests, if Mr. T. R. Ramachandra Ayyar's intervention is allowed. The minors have not appealed but Mr. T. R. Ramachandra Ayyar relies on the provisions of Order XLI, rule 33. The father (first defendant) in this case appears quite properly to have declined to be the guardian *ad litem* of his minor children. The plaintiff's agent swore that the mother was also unwilling to be appointed. Consequently on 25th September 1924 the Head Clerk of the Court was appointed guardian of the minors. On 19th December 1925 nearly fifteen months after the appointment of the Head Clerk and a month before the hearing of the case the mother moved for her appointment as guardian—on the ground that the interests of the minors were being neglected and no proper defence had been put in on their behalf—the Court guardian having adopted the defence of defendant 1 and put the plaintiff to strict proof that the debt was binding on the minors. They were unrepresented at the trial. The mother asked for

stay of further proceedings. This was apparently refused, but the mother was brought on as guardian on 22nd February 1926 by an order of this Court. She still did not ask to be joined as an appellant in the appeal which was not heard by us till 20th December 1926. She had managed to obtain a stay of execution from April 1925 to March 1926 by means of these guardianship proceedings. It seems to me that these facts have only to be stated to disentitle the mother to the exercise of any discretion in her favour at our hands. The rule relied on by Mr. T. R. Ramachandra Ayyar is no doubt very wide in its language. Literally applied it might be taken to mean that as long as there is one appellant out of perhaps 50 on the record that is quite sufficient to enable the Appellate Court to pass a decree in favour of the other 49 if it finds in favour either wholly or partially of the single appellant. This is of course absurd. The rule is taken from a (much longer) rule in the English Annual Practice, Order LVIII, rule 4, and was incorporated in the Code of 1908 in order to allow the Appellate Court to do complete justice between the parties. The question of the ambit of the rule does not seem hitherto to have arisen in this Court. Mr. T. R. Ramachandra Ayyar relies on a case reported in *Erfanuddin Molla* v. *Badan Sheikh*(1), where a single Judge of the Calcutta High Court held that if it appears on an examination of the record that a minor has not been properly represented the decree cannot stand although the minor may not have appealed which he could not do as he was not properly represented. We have nothing here but the mother's affidavit that there was any valid defence to be put forward for the minors. The Subordinate Judge dealt with the binding nature of the debt on them; and the story as to the money

(1) (1919) 51 I.C., 583.

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having been advanced through the Nattukottai Chetty by the plaintiff's own mother-in-law strikes me as most improbable. It cannot be believed for a moment. *Jawahar Bano* v. *Shujaat Husain Beg*(1) has no application to the present case. The Judges referred to *Rangam Lal* v. *Jhandu*(2) and distinguished the case before them on the ground that if the plaintiff's suit were simply dismissed they would be deprived of the amount to which they had been found entitled. The case was peculiar as three appeals were disposed of in one judgment. I do not think that *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(3) helps Mr. T. R. Ramachandra Ayyar either. There the second defendant did not appeal, but the High Court awarded to plaintiffs a sum of money which had been awarded directly to him by the trial Judge. Their Lordships pointed out that the whole decree was under appeal by the appeal of defendant 1. The rule of the Civil Procedure Code relied on here was not cited. On the other hand there is authority, though not of this Court, as to the limits of the rule. There are three cases, *Gangadhar* v. *Banabashi*(4), *Abjal Majhi* v. *Intu Bepari*(5) and *Akimannassa* v. *Bepin Behari*(6) first two of which it is laid down that the exercise of the rule is to be limited to cases where the Court has interfered in favour of the appellants and further interference is required to adjust the right of parties. It cannot be invoked to enable a party to ignore the other provisions of the Code or the provisions of statutes like the Limitation and Court Fees Acts. The third case is really not in point here—a plaintiff who had not cross-appealed or filed a memo. of objections was allowed to withdraw from the suit on appeal and to bring a fresh

(1) (1921) I.L.R., 43 All., 85.
(2) (1912) I.L.R., 34 All., 32.
(3) (1917) I.L.R., 44 Calc., 759 (P.C.).
(4) (1915) 22 C.L.J., 390.
(5) (1915) 22 C.L.J., 394.
(6) (1915) 22 C.L.J., 397.

suit on the same cause of action as he had been placed in a position of embarrassment by the decree of the trial Court which the High Court held to be unsatisfactory. In *Shib Chandra* v. *A. C. Dulcken*(1) MOOKERJEE, J., thought the rule must be cautiously applied, where in fact recourse to it was necessary to prevent an injustice from being done. In *Kshum Chand Bhuturia* v. *Ghane Muhammad Saha*(2) another Bench of the Calcutta High Court followed the cases in *Gangadhar* v. *Banabashi*(3), and *Abjal Majhi* v. *Intu Bepari*(4). Lastly, three learned Judges of the Allahabad High Court in *Rangam Lal* v. *Jhandu*(5) in considering the rule drew attention to rule 22 of the same order and observed that if a respondent wished to take exception to so much of the decree as was against him he must comply with its provisions. They continued

"where for example it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the Court may grant relief to the respondent although he has not filed an appeal or preferred an objection."

In my opinion these rulings as to the ambit of the rule under discussion are sound and no authority has been shown to us to convince us to the contrary. The intervention on behalf of the minors must be disallowed

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(1) (1918) 28 C.L.J., 123.
(2) (1917) 38 I.C., 361.
(3) (1915) 22 C.L.J., 390.
(4) (1915) 22 C.L.J., 394.
(5) (1912) I.L.R., 34 All., 32 (F.B.).