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BABU LA v. ISHRI PRA NARAIN SINGH.

PEARSON, J.—Concurred.

OLDFIELD, J.—Having reheard the arguments in this case, I modify the opinion expressed in my former judgment, and concur in the order proposed by my colleagues.

PRIVY COUNCIL.

P. C.* 1879 *November*

BADRI PRASAD (PLAINTIFF) *v.* MURLIDHAR AND OTHERS (DEFENDANTS.)

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

Usury laws under Regulation XXXIV of 1803—Obligation on mortgagee to file accounts.

In a mortgage dated in 1852 of *malikana* fixed for the period of settlement, it was agreed that the mortgagee should collect the village *jama*, pay the Government demand, and take the *malikana*, of which part was to be received by him as interest on the money lent at one per cent. per mensem, and the balance, *viz.*, Rs. 565 per annum, was to be retained by him as the costs of collection. No accounts were to be rendered of the *malikana* collected during the time of the mortgagee's possession.

If this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Regulation XXXIV of 1803 until the passing of Act XXVIII of 1855), and would not have prevented the accounts from being taken.

But as the Courts found that the Rs. 565 per annum constituted a fair percentage, which it had been *bonâ fide* agreed should be allowed to the mortgagee for the costs of collection, it was *held* that the agreement had been rightly treated as a sufficient answer to a suit based on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied if the accounts (contrary to the agreement) were taken on the basis of charging the mortgagee with the Rs. 565, or so much thereof as he should fail to prove had been actually expended in the collection.

If the amount received by the mortgagee had been fluctuating, production of the accounts might have been necessary for a decision on the validity of the agreement set up. But it could not be said that by no agreement could a mortgagee relieve himself from the obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV of 1803: and in this case he had done so: the only sum that he was to receive beyond the interest allowed by law being an unvarying balance found to be a fair allowance for the costs of collection.

**Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

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BADRI PRASAD v. BRIJDHAR.

Appeal from a decree of the High Court for the North-Western Provinces at Allahabad, dated the 25th November, 1876, affirming a decree of the Subordinate Judge of Aligarh, dated the 18th September, 1875.

This suit was for the redemption of a mortgage of *malikana* received from five villages in a taluqa called Guhrari, in the Aligarh district. The total rent payable to the *mukaddam biswadaran* of these villages, under the settlement of 1836, was Rs. 9,870, of which they had to pay Government revenue to the amount of Rs. 7,649, retaining the difference, Rs. 2,221, as their *malikana*. On the 16th January, 1852, they mortgaged this *malikana* to a Gokal Das, agreeing to place him in the same position as they were themselves as regards the right to collect the whole *jama* from the malguzars. That part of the instrument of mortgage which was material to the question in this suit is set forth in the judgment on this appeal. In August, 1864, the son of Gokal Das sold the interest of the mortgagee, which had descended to him, to the respondents; and in 1874 and 1875 this appellant purchased from the mortgagors, or their successors, their interest in the mortgaged *malikana*. In June, 1875, the plaintiff sued for redemption, attempting to show that, allowing the actual cost of collection from May next after the execution of the mortgage, when the first collections were made, with interest at the rate of 12 per cent. per annum, the whole debt, principal and interest, would have been paid off in 1863-64. For the defence it was insisted that the plaintiff was bound by the stipulations of the mortgage. On an issue as to whether the sum of Rs. 565 was a fair allowance for the costs of collection, the Subordinate Judge found that it was so; and that "the biswadars from whom the mortgagee lambardar had to collect rents are numerous in each village: in mauza Rothipura the biswadars are 90 and in Harduari 200, and the mortgagee has to collect very small items from them". He concluded that the plaintiff was not entitled to any reduction of the mortgage-money, as the contract had been *bonâ fide* made, and dismissed the suit. The High Court, on an appeal urging that the Rs. 565 must be regarded as a usurious addition to the legal interest, declared as follows:—

"We are of opinion, however, that the above stipulation in the mortgage is not in the nature of a contract for interest. When the parties agreed that Rs. 565 should be allowed for expenses without an account, there was no evasion thereby of the law, or any contract to give usurious interest. This item was *bonâ fide* for the cost and risk of collections. It is an item in the accounts based on the footing of a distinct contract quite apart from the question of interest, and when we look at the position of the mortgagees, there was nothing unusual or unfair about it. They had to collect Rs. 9,870 from the biswadars, and were responsible for the payment of the revenue, and they had moreover to see that the biswadars made the collections from the tenants. Their position was certainly one of some risk, and the percentage allowed to them for the expense and risk of collecting was certainly not exorbitant or unusual. It may or may not be that their actual expenses fell short of the sum allowed, but this consideration will not render the arrangement a contravention of Regulation XXXIV of 1803, and therefore one to be set aside. The view here taken is, we find, supported by decisions of the Courts, cited by Mr. Macpherson in the 5th edition of his work on Mortgages, pages 51 and 53. We affirm the decision of the lower Court and dismiss the appeal with costs."

On appeal against this decision,

Mr. *Doyne* appeared for the appellant.

Mr. *Leith*, Q. C., and Mr. *Ernest E. Witt*, for the respondents.

Mr. *Doyne* for the appellant contended that the respondents as mortgagees were bound by law to produce accounts, and that without the production and verification of the accounts no satisfactory conclusion could be arrived at on the question whether the allowance of Rs. 565 was a reasonable stipulation, or an evasion of the laws against usury.

The respondents were not called upon.

Their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—This is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and

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assignees of the mortgagee's interest. The mortgage-deed between the original parties was dated 16th January, 1852. It was a mortgage of what was called the *malikana* interest of certain taluqdars; the amount of that *malikana* being, during the pendency of the then settlement, a fixed and known sum. The mortgage-deed contained this stipulation: "We hereby make a written agreement that the said mortgagee having taken possession of the mortgaged villages, with all the powers enjoyed by us, may on his own authority collect the *jama* fixed by the Government from the villages of the *ilaqa*, and himself pay the revenue to the Government, instalment after instalment, according to the usage in the pargana; that he may bring to his own use the income of the *malikana* due to us, crediting every harvest Rs. 1,656 per year as interest on the amount of consideration on this mortgage, at the rate of one per cent. per mensem, and take the remainder, Rs. 565, the surplus of the *malikana*, as his own collection fee and pay of the agent and peons employed for making collections in the villages; that is, he may credit the income of the *malikana* to the payment of two items—one, the interest on the mortgage-amount, and the other the expenses incurred in making collections in the villages; for we have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the *malikana* profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The principal question raised by the present appeal, and argued by Mr. Doyne at the bar, is whether this agreement is sufficient to deprive the plaintiff of his statutory right, under the 9th and 10th sections of Regulation XXXIV of 1803, to call upon the defendants to render the account mentioned in those two sections. A preliminary question however arises as the legal validity of the agreement. There can be no doubt that such a contract would previous to that Regulation have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from

having to account for them. But there can be, on the other hand, no doubt that at the time when this mortgage was made the law by which the contract was governed was otherwise; that the Regulation had limited the rate of interest to twelve per cent., and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts between mortgagor and mortgagee was regulated by the 9th and 10th sections. Therefore if the stipulation in question had been made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, it would have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present case, however, both the Indian Courts have found in favour of the legal validity of the stipulation as will presently be more fully stated. It has however been contended that, however this may be, a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under the 9th and 10th sections; and this is the principal, if not only, point raised by the appellant.

Their Lordships are of opinion that this contention is not well-founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. On the other hand the 15th section says:—"Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly; and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice." It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs. 565 constituted a percentage which was *bonâ fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about 5¾ per cent., was certainly neither exorbitant nor unusual. Having so

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found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs. 565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the defendants to file accounts would be to increase the costs of suit which must ultimately fall on the plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this appeal with costs.

Agent for the appellant: Mr. *T. L. Wilson.*

Agent for the respondent: Messrs. *Pritchard* and *Sons.*

APPELLATE CIVIL.

1880
January 2.

Before Mr. Justice Spankie and Mr. Justice Straight.

COHEN (DEFENDANT) *v.* THE BANK OF BENGAL (PLAINTIFF).*

Bill of Exchange—Exclusion of Evidence of Oral Agreement—Act I of 1872 *(Evidence Act), s.* 92.

It was agreed between the Bank of Bengal at Calcutta and *C* and *Co.*, who carried on business there, that the Branch of the Bank at Cawnpore should discount

* Second Appeal, No. 318 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 13th November, 1878, modifying a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 25th September, 1878.