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The other cases cited by Mr. Evans do not, as far as I can see, throw any light upon the subject. I am of opinion that the rule should be made absolute with costs.

TOTTENHAM, J.—Under the circumstances I concur in making this rule absolute, but I think that, even if we entertained doubt as to the power of this Court to interfere under s. 622 of the Civil Procedure Code, it would be our duty to express such an opinion upon the manifest irregularities set out in Mr. Justice Norris's judgment as would induce the Court below of its own accord to desist from enforcing the order against which the rule has been obtained.

The rule will be made absolute with costs.

Rule made absolute.

H. T. H.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Norris.

NOBIN CHUNDER BANNERJEE (PLAINTIFF) *v.* ROMESH CHUNDER GHOSE AND OTHERS (DEFENDANTS).*

1887 *March* 31.

Hindu law, Contract—Interest recoverable at any one time, Amount of—Dámdupat, Rule of—Act XXVIII of 1855*—High Court, Ordinary Original Civil Jurisdiction.*

The rule of Hindu law, known in Bombay as the rule of *Dámdupat*, that no greater arrear of interest can be recovered *at any one time* than what will amount to the principal sum, is neither a mere moral precept nor limited in its application to other than stipulated interest, and as a part of the Hindu law of contract is, in the absence of any legislative enactment to the contrary, the law as between Hindus in the High Court in its Ordinary Original Civil Jurisdiction.

Act XXVIII of 1855 deals exclusively with the rate of interest which may be allowed, and there is nothing in that Act inconsistent with the rule of *Dámdupat*.

Nathubhai Panachand v. *Mulchand Hirachand* (1) distinguished.

NOBIN CHUNDER BANNERJEE as purchaser under a deed of sale, dated the 2nd day of July, 1883, brought a suit for possession of an undivided third part or share of a house and premises,

* Original Civil Appeal No. 26 of 1886, against the judgment of Mr. Justice Trevelyan, dated the 21st of July, 1886.

(1) 5 Bom. A. C., 196.

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numbered 57, Baugbazar Street, in the town of Calcutta and for redemption of the other undivided two-thirds thereof. The plaint alleged that the principal defendants were like their predecessor in wrongful possession of the house, and, although the plaintiff had, since the date of his purchase, been ready and willing to redeem the mortgage, the defendants had refused to give up possession. The plaintiff deposited in Court the sum of Rs. 600 as the amount which he believed would be enough to satisfy the mortgage debt. Hurro Moni Bewa and another, the principal defendants, whilst admitting that their predecessor in title had originally held the house under two mortgages, one an equitable mortgage for Rs. 100 and the other an ordinary mortgage for Rs. 200 with interest at 18 per cent. per annum, disputed the title of the plaintiff's vendor, stating that whatever interest was left in the mortgagors had all been abandoned in favor of the defendants' predecessor, who had been in peaceful possession of the house and treated it in all respects as his own for a period of 16 years.

The cause came on for final disposal before Cunningham, J., who gave the plaintiff a decree and directed the Registrar to take the following accounts: (*a*) an account of what was due to the defendants for principal on the equitable and legal mortgages, mentioned in the plaint, and for interest only on the said legal mortgage at the rate of 18 per cent. per annum up to the date of tender by the plaintiff of the sum of Rs. 600 in Court; (*b*) an account of the rents and profits of the house and premises, numbered 57, Baugbazar Street, since the date of the plaintiff's purchase. The Registrar was further directed to deduct from the first head the account found to be due under the second. That officer accordingly took the accounts as directed, and, in conformity with the rule of *Dámdupat*, allowed only Rs. 200 out of Rs. 528-12, which was found to be actually due as interest on the mortgage sum. Exception was taken to his finding, and the case came upon further directions before Trevelyan, J., who, although of opinion that the Hindu law of *Dámdupat* was the law in Calcutta as between Hindus [*Ram Connoy Audicarry* v. *Johur Lall Dutt* (1)], allowed, in view of the wording of the

(1) I. L. R., 5 Calc., 867.

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decree of Cunningham, J., the full amount of interest actually found due on the legal mortgage. "The question in the case," observed the learned Judge, "is whether by applying that law I shall not be varying the decree of the 23rd February, 1885; I must give to that decree every possible effect, and must give some meaning to every portion of it. * * * * The decree provides for the contingency of the amount to be found due for principal and interest exceeding the sum of Rs. 600. If the law of *Dámdupat* applied the amount could not by any process of calculation exceed the sum of Rs. 500. I must therefore take it that, for some reason or other, the learned Judge (Cunningham, J.) has excluded from this case the operation of the law of *Dámdupat* and has held that the interest recoverable is not limited by that law."

Against this decree of Trevelyan, J., the plaintiff appealed.

Mr. *Bonnerjee* (with him Mr. *Mullick*) for the appellant.—The construction placed upon the decree of the 23rd February is not correct. The Registrar was not precluded by the terms of that decree from giving effect to the rule of *Dámdupat*.

Mr. *O'Kinealy* for the respondents.—The Registrar was bound to take the accounts according to the strict terms of the decree. The decree excludes the rule of *Dámdupat*. Had that rule been in contemplation the form in which the accounts were directed to be taken would have been different from what it is now. The law of *Dámdupat* does not apply to this case. This is a case of mortgage where the mortgagee had to account for the rents and profits. It was broadly laid down in *Narayan bin Babaji* v. *Gangaram bin Krishnaji* (1) that the rule of *Dámdupat* did not apply to mortgage transactions. In this case the mortgagees were in possession, and under the authority of *Nathubhai* v. *Mulchand* (2) the rule is excluded. [WILSON, J.—The substance of that decision is that the rule does not apply to usufructuary mortgages.] *Ganpat Pandurang* v. *Adarji Dadabhai* (3) limits the rule to a case of mortgage where no accounts of rents and profits have to be taken. Where a party has contracted to pay a certain interest

(1) 5 Bom. A. C., 157. (2) 5 Bom. A. C., 196.
(3) I. L. R., 3 Bom., 312.

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he is bound to pay that interest, and even if morally wrong the Court is bound to allow the stipulated amount of interest under the Hindu law. The authorities with respect to the rule are limited to one case in this Court—*Ram Connoy Audicarry* v. *Johur Lall Dutt* (1). There is no such law in the Mofussil—*Het Narain Singh* v. *Ram Dein Singh* (2). The Statute 21, Geo. III, c. 70, has been repealed, so far as it relates to Hindu contracts, by the Indian Contract Act—*Madhub Chunder Poramanick* v. *Raj Coomar Dass* (3). It is in *Mia Khan* v. *Bibi Bibijan* (4) that approval is for the first time given in Bengal to the rule of *Dámdupat*. In *Ram Lall Mookerjee* v. *Haran Chandra Dhar* (5) Peacock, C.J., held that the restriction imposed by Hindu law on the rate of interest had not been abolished by Act XXVIII of 1855. In *Mia Khan* v. *Bibi Bibijan*, Phear, J., dissented from that decision. *Dámdupat* is a rule of moral and not one of legal obligation under the Hindu law. There is nothing in Hindu law to prevent a party from contracting himself out of the rule. According to Katyayana stipulated interest must always be paid. It is clear from the ancient authorities that so long as the interest is received at stated periods the creditor may take any amount. The restriction as to interest is one of moral, not legal, efficacy. The text of Vrihaspati is explicit upon the point. Manu allows an exorbitant rate of interest in certain cases, for instance when the borrower happens to be a sea-goer. Compare *kalika*, *kharita* and *kayika* forms of interest. There is very small difference between *kayika* and *kalika*, which deal with interest laid down by the law. These differ entirely from *kharita* or stipulated interest. (Colebrooke's Digest, Book I, c. 1, s. 1, para 2; Book I, c. 2, s. 1, paras. 2 and 30; Book I, c. 2, s. 37, para. 35.) If the interest allowed by law is allowed to run on, it is stopped when it becomes equal to the principal; but stipulated interest is always recoverable. [Mr. *Bonnerjee*.—I do not wish to interrupt; but all this applies to the rate of interest.] There is no doubt that the law of *Dámdupat* is a part of the Hindu law of usury.

(1) I. L. R., 5 Calc., 867.
(2) I. L. R., 9 Calc., 871.
(3) 14 B. L. R., 76.
(4) 5 B. L. R., 500.
(5) 3 B. L. R., O. C., 130.

If there is any law here which cuts down the law of usury it cuts down the law of *Dámdupat* with it—that law is Act XXVIII of 1855. *Dámdupat* is not a rule of limitation different from the law of limitation as a part of the law of usury. It would be a strange thing in the case of promissory notes if *Dámdupat* was the law.

Mr. *Mullick* in reply.—*Ram Lall Mookerjee* v. *Haran Chandra Dhar* (1) lays down how far the Hindu law governs the Hindus of Calcutta—*Mia Khan* v. *Bibi Bibijan* (2); *Deen Dyal Paramanick* v. *Koylash Chunder Pal Chowdhry* (3). The rule of *Dámdupat* is clearly a rule of Hindu law—*Dhondu Jagannath* v. *Narain Ramchandra* (4); *Khushal Chand Lall Chand* v. *Ibrahim Fakir* (5). The true reason of the rule is that it prohibits the accumulation of interest. You may take almost any amount as interest if you take it by degrees; but you cannot recover *at any one time* more interest than what is equal to the principal. The scheme upon which the subject is treated in the Digest is this: Chapter I deals with loans, Chapter II with interest, and its subdivisions deal with (*a*) interest in general, (*b*) special forms of interest, (*c*) interest specially authorised, (*d*) limits of interest, (*e*) debts bearing no interest. There runs through the various texts the doctrine that the interest recoverable *at any one time* must not exceed the principal. The text of Vachaspati Misra explains the meaning of "stipulated interest," and is quoted with approval in *Dhondu Jagannath* v. *Narain Ramchandra* (6). In the Digest the article devoted to limits of interest is thus described: "The principal can in general only be doubled, &c.," and the subject of "rate of interest" is treated as entirely distinct from that of the "limit of interest."

The judgment of the Court (PRINSEP, WILSON and NORRIS, JJ.) was delivered by

WILSON, J.—The plaintiff in this case purchased the property to which the suit relates on the 2nd July, 1883, the property being

(1) 3 B. L. R., O. C., 130.
(2) 5 B. L. R., 500.
(3) I. L. R., 1 Calc., 92.
(4) 1 Bom. 47.
(5) 3 Bom. A. C., 23.
(6) 1 Bom. 49.

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then subject to two mortgages, one an equitable mortgage for Rs. 100 without interest, the other a legal mortgage for Rs. 200 with interest at 18 per cent. The plaintiff brought this suit to redeem the mortgages and recover possession of the property. He paid into Court Rs. 600 as sufficient to cover all that could be due upon the mortgages to the defendants or any of them. He alleged that the defendants or some of them had wrongfully obtained and held possession from a time long before his own purchase, and for this he claimed mesne profits.

The case was heard before Cunningham, J., who made his decree, dated the 23rd February, 1885, by which he ordered certain accounts to be taken—(*a*) "an account of what is due to the defendants for principal on the equitable and legal mortgages. . . . . and for interest only on the legal mortgage at the rate of 18 per cent. per annum up to the date of tender by the plaintiff of the sum of Rs. 600;" (*b*) "an account of the rents and profits of the house and premises" since the date of the plaintiff's purchase. It was ordered that the amount found on taking the second account should be deducted from that found on the first; and provision was made, first, for the case of the sum found after such deduction not exceeding the Rs. 600 paid in, and, secondly, for the case of its exceeding that sum. The other provisions in the decree were those that are usual in a decree for redemption.

The Registrar took the accounts as directed and made his report. The material passage in that report is this: "There is due to the defendants upon and by virtue of the equitable and legal mortgages the sums of Rs. 100 and 200 for principal and the sum of Rs. 528 for interest on the principal sum due on the said legal mortgage. Out of the sum of Rs. 528-12 I have allowed only Rs. 200, and have disallowed the rest under the rule of *Dámdupat*." This finding of the Registrar was excepted to, and the case came upon further directions before Trevelyan, J. The learned Judge agreed with the Registrar in thinking that the rule of *Dámdupat*, by which the amount of interest recoverable at one time cannot exceed the principal, was properly applicable to the case, but he thought he was precluded by the terms of the decree of Cunningham, J., from applying it. He, therefore, allowed the

exception, and varied the report accordingly. Against that decision the plaintiff has now appealed.

We are unable to agree with the view which the learned Judge has taken of the construction of the former decree. The governing passage in the decree is that in which the accounts to be taken are defined. The first account is of "what is due" for principal and interest upon the mortgages, and it would, we think, require very strong ground to justify us in extending those words so as to include anything not legally due. The fact that a subsequent passage contemplated a result of the account which the rule of *Dámdupat* would render impossible is not, in our judgment, sufficient. The most that that can show is that the question of *Dámdupat* was not present to the mind of the learned Judge who made the decree, not that he considered and excluded the rule.

But it was contended on behalf of the respondent that, on the merits and apart from any question arising upon the construction of the original decree, there is no rule applicable to this case limiting the interest recoverable to a sum equal to the principal. This involves two questions; first whether the rule of *Dámdupat*, whatever it be, does or does not apply in this Court to contracts between Hindus; secondly, if it does, whether it has the effect of limiting the amount of interest recoverable in this case.

It is well settled that in this province, outside the Presidency town, no rule limiting the amount of interest to a sum equal to the principal prevails. This has been held in *Deen Dyal Paramanick* v. *Koylash Chunder Pal Chowdhry* (1); *Surjya Narain Singh* v. *Sirdhary Lall* (2); *Het Narain Singh* v. *Ram Dein Singh* (3); and in other cases, and it is no doubt an anomaly that there should be one rule in Calcutta on such a point and another outside it. But a comparison of the history of the law of contracts in the Presidency town with that in other parts shows, we think, that the difference does exist. The Statute 21, George III, c. 70, s. 17, required the Supreme Court of Fort William to determine "all

(1) I. L. R., 1 Calc., 92. (2) I. L. R., 9 Calc., 825.
(3) I. L. R., 9 Calc., 871.

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matters of contract and dealing between party and party in the case of Gentus by the laws and usages of Gentus." There was never any such legislative provision in force in the rest of the province. The result was that, as between Hindus, the Supreme Court was expressly bound to give effect to the Hindu law of contracts, and the Hindu law of contracts included the law of *Dámdupat*. The High Court by its first charter was required to administer the same law as the Supreme Court, and the second charter continues the same law as was in force under the first. It appears to follow of necessity that the law of *Dámdupat* is in force in this Court between Hindus, unless there has been some legislative enactment inconsistent with it.

The only Act cited said to be inconsistent with it, and therefore to overrule it, is the Act for the repeal of the Usury Laws (XXVIII of 1858). But we think there is nothing in that Act (which deals exclusively with the rate of interest which may be allowed) inconsistent with the rule now in question. And the authorities are unanimous in favor of that view. To this effect are the decisions of Sausse, C.J., and Forbes and Newton, JJ., in *Dhondu Jagannath* v. *Narayan Ram Chandra* (1); of Couch, C.J., and Newton, J., in *Khusal Chand Lal Chand* v. *Ibrahim Fakir* (2); of the learned Judges in *Nathubhai Panachand* v. *Mulchand Hirachand* (3); of Couch, C.J., and Westropp, J., in *Hakima Manji* v. *Meman Ayab Haji* (4). The same law was laid down by Westropp, C.J., and Nanabhai Haridas, J., in *Pava Nagaji* v. *Govind Ramji* (5), and re-affirmed by Westropp, C.J., and Melvill, J., in *Ram Chandra Mankeshwar* v. *Bhimrav Ravji* (6), and by Westropp, C.J., and Green, J., in *Ganpat Pandurang* v. *Adarji Dadabhai* (7). In this Court the authorities lead to the same result. In *Ram Lall Mookerjee* v. *Haran Chandra Dhar* (8) Peacock, C.J., went even further and held that Act XXVIII of 1855 did not affect the rules of the Hindu law relating directly to the rate of interest. The correctness of this view carried to its full extent was questioned by Phear, J., in

(1) 1 Bom. 47.
(2) 3 Bom. A. C., 23.
(3) 5 Bom. A. C., 196.
(4) 7 Bom. O. C., 19.
(5) 10 Bom., 382 & 385.
(6) I. L. R., 1 Bom., 577.
(7) I. L. R., 3 Bom., 312.
(8) 3 B. L. R., O. C., 130.

Mia Khan v. *Bibi Bibijan* (1), but that learned Judge fully approved of the Bombay decisions; and the same rule was followed in *Ram Connoy Audicarry* v. *Johur Lall Dutt* (2). The result is that, in our opinion, the rule in question does in this Court apply to contracts between Hindus.

The question remains whether the effect of the rule is to preclude the defendants from claiming the full amount of interest in this case. The statement of the rule in the first of the Bombay cases already referred to has generally been accepted as correct. "The rule of Hindu law is simply this, that no greater arrear of interest can be recovered at any one time than what will amount to the principal sum." But on behalf of the respondent it was argued that the nature of the doctrine has been totally misunderstood, the main contentions being, first, that the rule of *Dámdupat* was only a moral precept and not a rule of law at all, and, secondly, that it applied only to interest prescribed by law in the absence of agreement and not to stipulated interest. The primary source of our knowledge on the subject is, of course, the text of Manu and the other original authorities. The texts are collected in Colebrooke's Digest, Book I, c. 2; and the works from which they are taken are now for the most part easily accessible to English readers. It was not contended that these texts taken by themselves suggest any restriction or qualification such as that proposed. But it was contended that the opinions of the commentators collected by Jagannatha and the views expressed by that learned writer himself throw an entirely different light upon the matter. The main question under consideration in the passages referred to is the rate of interest which might lawfully be charged, and whether there was any restriction in the case of stipulated interest; in connection with this the rule as to interest not exceeding the principal is also discussed. Mr. O'Kinealy showed very clearly that some at least of the commentators were disposed to restrict that rule or get rid of it altogether as a rule of law; but it is equally clear that they are far from being agreed as to the principle upon which, or the extent to which, it could be limited, some leaning to the view of a mere moral precept, others to confine it

(1) 5 B. L. R., 500 & 505. (2) I. L. R., 5 Calc., 867.

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to legal as distinguished from stipulated interest. And though Jagannatha does, if we rightly understand him, express his own opinion upon the main question under discussion whether there was any restriction of rate in the case of stipulated interest, we cannot find that he does so with regard to *Dámdupat*. Harington (Analysis, Part I, s. 3, p. 181) says with reference to this discussion: "A considerable difference of construction has been given by the commentators upon the Hindu law of contracts to the texts which respect the limitation of interest and the invalidity or immorality only of usurious loans and engagements." And Sir Thomas Strange (Hindu Law, Vol. I, p. 298) says: "Involved in apparent contradiction the subject is considered by Jagannatha to be intricate, nor has his Commentary always the effect of elucidating what is obscure or disentangling what is perplexed." We agree with these remarks and cannot gather any distinct rule from this source. All the later authorities agree in understanding the rule of *Dámdupat* as it has been laid down by the Bombay Court. Thus Sir Thomas Strange, in the place already referred to, so states it; and in the Appendix to Chapter XII he gives a case (p. 473, Edit. of 1830) to which are appended remarks by Colebrooke and Ellis, both of whom independently and without hesitation state the law to the same effect. Lastly there is the long series of decisions in the Bombay High Court and this Court, from the whole of which we must dissent if we were to hold either that the rule of *Dámdupat* is a mere moral precept or that it does not apply to stipulated interest. And that we are not prepared to do. The anomaly of the present state of the law, if it is to be removed, can only be removed by the Legislature.

One other argument it is necessary to notice. It was contended, on the authority of *Nathubhai Panachand* v. *Mulchand Hira Chand* (1), that the rule in question cannot equitably be applied in the case of a mortgagee in possession when the account is taken on both sides, the mortgagee being as such debited with the rents and profits. And it was said that this case fell within the rule there laid down. But the facts here are very different. The account of rents and profits was

(1) 5 Bom. A. C., 196.

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not asked or ordered against the defendants as mortgagees in possession, but by way of mesne profits against wrong-doers; and accordingly they were limited to the time since the plaintiff's purchase, which could not properly have been done if the account was on the other footing.

The result is that, in our opinion, the order of the learned Judge, so far as it allowed the plaintiff's exception and varied the report of the Registrar, was wrong, and that the report should have been and should now be confirmed in its entirety.

K. M. C. *Appeal decreed.*

Attorney for the appellant: Baboo *N. C. Bural.*

Attorney for the respondents: Baboo *N. C. Bose.*

Before Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Norris.

1887 *April* 1.

RAMDOYAL (PLAINTIFF) *v.* JUNMENJOY COONDOO (DEFENDANT).*

Limitation—Suit for partnership accounts—Joint contract—Necessary parties, Omission of—Addition of new defendant—Time of joinder, how material.

A suit was brought for partnership accounts. Upon the objection of the defendant it was found that a necessary party defendant had been omitted, and such party was afterwards added as a defendant at a time when the suit as against him was barred:

Held, that the whole suit was rightly dismissed.

RAMDOYAL brought a suit against Junmenjoy Coondoo on the 11th September, 1885, for the accounts of a partnership which had been dissolved on the 17th September, 1882. The plaintiff alleged that he and the defendant had been carrying on business as gunny-bag merchants at Burra Bazar in the town of Calcutta in co-partnership under the name and style of Junmenjoy Coondoo; that the defendant was a partner with capital and he (Ramdoyal) was the working or managing partner without capital, and in consideration of his service as such it was agreed that he should have a three annas share in the profits of the partnership business and get besides a certain *khoraki* or boarding allowance out of the said business.

* Original Civil Appeal No. 6 of 1887, against the decree of Mr. Justice Trevelyan, dated the 22nd of February, 1887.