

## PRIVY COUNCIL.

P. C.  
1896  
June 19th  
July 31st.

MATHURA DAS AND ANOTHER (APPELLANTS) v. RAJA NARINDAR  
BAHADUR (RESPONDENT).

[On appeal from the High Court at Allahabad.]

*Mortgage—Post diem interest—Damages—Construction of document—Continuing breach of contract—Limitation—Act XV of 1877, Articles 115 and 116.*

No payment had been made on an agreement contained in a mortgage-deed for payment of the principal within a year, and interest thereon at a stated rate. The deed provided that the borrower would not transfer the mortgaged property until payment in full of the amount due for principal and interest and that any money paid should be first credited to the latter.

In a suit brought more than seven years after the date fixed for payment, the courts below gave effect to the defence that the creditor had no right under the contract to interest at the rate specified therein for the period after that date; and that limitation barred recovery of money by way of damages for a breach of the contract.

*Held*, that the Courts below had erred as to the effect of the contract, and that there had been a failure to regard the intention shown by the conditions in the mortgage-deed above mentioned, the High Court appearing to have acted on a fixed rule of construction laid down for transactions of this kind, instead of arriving at the meaning of the deed by an examination of its terms. By the true construction of the contract, when the whole of it was considered, the creditor was entitled to payment of the principal with interest at the rate stated in the deed for the entire period of non-payment. This should be down to the date of the decree of the first court. In the decree should be added interest from its date till payment at six per cent. per annum.

Even supposing the construction put by the Courts below to have been correct, the creditor still might have recovered six years' arrears of interest by way of damages, notwithstanding limitation. There had been a breach of contract daily while the principal remained unpaid, and unbarred by time.

The judgment of the Full Bench in *Narindra Bahadur Pal v. Khadim Husain* (1) was not approved; as it disregarded conditions in the mortgage deed (which in that case resembled the present deed) indicating the intention of the parties to it.

APPEAL from a decree (27th April 1891) of the High Court affirming a decree (7th September 1888) of the Subordinate Judge of Gorakhpur.

Present: LORD WATSON, LORD HOBHOUSE and SIR R. COUCH.

(1) I. L. R., 17 All., 581.

1896

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MATHURA  
DAS  
v.  
RAJA  
NARINDAR  
BAHÁDUR.

The appellants were the successors in the firm of the plaintiffs who filed this suit upon a registered deed of mortgage executed on the 17th February 1888 by the late Raja Bhawani Ghulam Pal, who died after the decree of the High Court, and whose representatives were brought on to the record for the purposes of this appeal on the 16th July 1892. The latter were now named as respondents; but Raja Narindar Bahádur Pal, the first of them, alone appeared as respondent to support the decree.

The material part of the deed, as well as the facts, appear in their Lordships' judgment.

The principal question raised by this appeal was whether the High Court had rightly construed the agreement in the mortgage-deed to repay the principal borrowed with interest at a specified rate within a year, with certain accompanying agreements; one against the transfer of the security by the mortgagor, and another relating to the appropriation of the payments to be made to the mortgagee. This governed the question whether the interest was to be paid at the specified rate during the whole time in which the debt and interest had remained unpaid. Secondly, it was disputed whether, supposing the contract to be only for a year's interest at the specified rate, compensating damages could be given for non-payment during the subsequent period, or were barred by limitation.

To secure the principal sum of Rs. 19,157, borrowed by him, the Raja mortgaged a mauza in zila Basti, by deed dated the 17th February 1880; and it was thereby agreed that he would repay the amount in full, principal and interest at Re. 1 as. 6 per mensem, "within a year." The borrower agreed that he would not transfer the mortgaged property until payment of both the principal and interest should have been made; and the deed provided that the amounts paid should be first credited to the payment of interest, and that the balance, after that, should go to reduce the principal. Nothing had been paid for principal or interest on the 19th June 1889, when in this suit the representatives of the mortgagee claimed payment, with interest at the rate of Re. 1-6 per mensem, for

the whole period, from the 17th February 1880 to the date of suit brought, that interest amounting to Rs. 26,358. The defendant, who disputed the rate of the interest, denied that he was liable for the period after the expiration of a year from the date of the deed at the rate claimed. He also contended that, as the property was not charged as a security for the payment of the interest after the date when the principal had become due, the six years' bar of limitation applied to the claim for damages for breach of contract.

The Subordinate Judge decreed the principal and one year's interest only at the rate stated in the mortgage-deed. The latter he construed as not containing any express agreement to pay interest at the rate specified after the expiration of one year. He was of opinion that no such agreement could be implied, and he held that if the claim for the amount due for interest after the 17th February 1881, should be put forward as damages for the delay in payment of the principal and interest for one year, then the claim by way of such damages would be barred by time, the breach of contract having occurred more than six years before the date of the suit. Some alleged acknowledgments of liability by the defendant were not, in the Subordinate Judge's opinion, sufficient to satisfy section 19 of the Indian Limitation Act, 1877. His judgment was mainly founded on the law laid down in *Mansab Ali v. Gulab Chand* (1). The decree was for interest on the amount, which he decreed at the rate of Rs. 12 per annum, from the date of the decree.

On the plaintiffs' appeal the High Court (STRAIGHT AND TYRRELL JJ.) affirmed the decree of the first court.

The material part of the judgment of the High Court was as follows:—

“ The present suit was instituted on the 19th of June 1888, and  
 “ by it the plaintiffs sought to recover from the mortgagor-defendant  
 “ and the mortgaged property the sum of Rs. 19,157 principal with  
 “ interest from the 17th February, 1880, to the date of the institution  
 “ of the suit, at the rate mentioned in the bond, amounting to

(1) I. L. R., 10 All. 85.

1896

MATHURA  
 DAS  
 C.  
 RAJA  
 NABINDAR  
 BAHADUR.

1896

MATHURA  
DAS  
RAJA  
NARINDAR  
BAHADUR.

“ Rs. 26,358-7, or in all Rs. 45,515-7. The defendant did not deny his liability under the bond as to the principal or the interest at the rate mentioned in the bond up to the date on which it became payable, but he objected to the claim of the plaintiff to the interest *post diem* on the ground that there was no covenant in the bond for the payment of such interest. The learned Subordinate Judge, from whose decree the appeal before us has been preferred, gave the plaintiff a decree for the principal amount due upon the bond, together with interest for one year amounting to Rs. 3,156, and he dismissed the rest of the claim.

“ The plaintiffs have appealed, and their appeal is confined to two matters : *first*, the mode in which the learned Subordinate Judge has construed the bond ; and *second*, to the question of *post diem* interest. In other words, two questions only are at issue before us in appeal, namely, whether the terms of the mortgage-bond, dated the 17th February, 1880, provided for the payment of interest, after the expiry of one year from the due date of the bond, and whether, regarding the *post diem* interest as damages, the bar of the limitation of Article 116 of Act No. XV of 1877 is saved by any acknowledgment or acknowledgments of the kind mentioned in Section 19 of such last mentioned Act.

“ As to the first of these two points there does not appear to me any room for doubt as to the language of the instrument of mortgage which is clear. It is as follows :— ‘ I shall pay off without any objection the said amount in full, principal and interest, at the rate of Re. 1-6 per cent. per mensem, within a year.....If I fail to pay off the amount within the fixed term, the said bankers shall be competent to realise the amount’, &c.

“ There is no distinction I can see to be drawn between the present case and that of *Sri Nivas Ram Pande vs. Udit Narain Misr* (1), and as the considered judgment in the case was delivered after we had heard Pandit Bishambar Nath for the plaintiffs-appellants upon the first question in this case, the reasoning we applied in that judgment is appli-

(1) Weekly Notes, 1891, p. 66.

“ cable to this appeal, and it is not necessary to repeat here the  
 “ remarks we then made. I am satisfied that, upon the language of  
 “ the instrument dated the 17th February 1880, there was no  
 “ covenant for the payment of *post diem* interest, and that the only  
 “ footing upon which the plaintiffs can be recouped for the loss they  
 “ have sustained by the non-payment of the mortgage money upon  
 “ the due date, is by way of damages, the limitation to a suit for  
 “ which is provided by Article 116 of the first schedule of the  
 “ Limitation Act. That being so, we have now to consider  
 “ whether that limitation stands in the way of their getting any  
 “ damages. The due date of the mortgage-bond sued upon was the  
 “ 17th February 1881, and the suit was brought on the 19th June,  
 “ 1888, which would be seven years and some three or four months  
 “ after the date when the amount of the instrument of mortgage  
 “ became payable.”

The judgment then considered documentary evidence that had been given of an alleged acknowledgment by the defendant of his liability to pay interest upon the bond debt after the due date of the bond; and arrived at the conclusion that there was nothing to be found that could be taken to constitute any such acknowledgment within section 19 of the Indian Limitation Act. The judgment added:—“ It is not without regret that I have placed this construction on these documents. The defendant had the use of the plaintiff’s money for a considerable period of time, and the rate of the interest in the bond was not an unreasonable one, which, but for the difficulty of limitation, I should not have hesitated to treat as a fair basis for estimating damages.”

On this appeal—

Mr. H. A. Giffard, Q. C., and Mr. Herbert Cowell, for the appellant, submitted that there was error in the judgment of the High Court; and that, according to the true construction of the agreement to pay interest, the rate was to be Re. 1 as. 6 a month after, as well as before, the due date. That the rate prescribed by the deed should continue until the payment of the principal should be made was the intention at the time when the contract was

1896

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MATHURA  
 DAS  
 ”  
 RAJA  
 NARINDRA  
 BAHADUR.

1896

MATHURA  
DAS  
v.  
RAJA  
NARINDAR  
BAHÁDUR.

made, as evidenced by the terms of the deed. It was not in the contract that the creditor should enforce payment of the debt at due date, or else submit to being paid interest at a reduced rate. On the contrary, it was clear, when the whole deed was read, that although it was to be open to the debtor to redeem within the year, the specified rate of interest was to continue until payment of the principal and interest should be made. This view was supported by the agreements accompanying the mortgage, *viz.*, that the debtor was not to transfer the mortgaged property till payment had been made of the principal and interest; and that the amounts paid by the debtor should be first credited to payment of the interest, and then that the balance should be credited to payment of the principal. This hardly applied to a payment within the year.

In the next place it was argued that, even if the High Court had been right in its construction, and even if the contract was restricted to the year, for the interest specified, at all events, the creditor would be entitled to interest at a reasonable rate, whether called by that name or not, and whether given by the court under the authority of the Interest Act XXXII of 1839, or awarded by the court as damages, compensating for the breach of contract. Viewing the sum to be awarded as damages, and having regard to the law of limitation, the court could have given six years' interest out of the seven years' and three months' interest claimed, on the assumption that Articles 115, and 116 of Act XV of 1877 were applicable. Compensation would be recoverable because the cause of action, in respect of the breach of contract to pay the principal and interest, was a continuing cause of action during non-payment. The High Court had itself pronounced the rate specified in the deed to be a reasonable one. Act XXXII of 1839 was cited, also Act XVIII of 1855, section 2. A mortgage-deed, similar to that in the present suit, had been held by the Calcutta High Court in *Bikramjit Tewari v. Durga Dyal Tewari* (1) to be within the meaning, so far as the promise to repay was concerned of the Interest Act above mentioned, which empowered the court to give

(1) I. L. R., 21 Cal., 274.

interest on money payable, within a certain term, under a written instrument. In *Narindra Bahádur Pal v. Khadim Husain* (1) the High Court at Allahabad had treated the agreement against any transfer by the mortgagor until payment, as one from which no inference could be drawn in regard to whether the interest after due date should be as the same rate as it had been before that date; and had dealt in the same way with the agreement that money paid by the mortgagor should be first credited to payment of the interest. It was argued that this was wrong. Reference was also made to *Sri Niwas Ram Pandé v. Udit Narain Misr* (2). This was also erroneously decided on the construction of the contract as to interest. Reference was also made to *Bhagwant Singh v. Daryao Singh* (3), and the decision of the Judicial Committee in *Chajmal Das v. Brijbhukhan Lal* (4).

Mr. J. D. Mayne, for the respondent Raja Narindar Bahádur Pal, referred to the terms of the mortgage-deed contending that by none of those terms was the interest made a charge upon the property mortgaged for more than one year. The interest for the first year was charged upon the land. This went to support the correctness of the opinion that a difference in the rates of interest before and after the due date was not contrary to the terms employed in the deed. The clear restriction to "within the year" had been rightly regarded in the judgment of the court below. He referred to *Narindra Bahádur Pal v. Khadim Husain* (1) and the cases cited in the judgment in that case, especially to *Cook v. Fowler* (5), cited also in *Lala Chajmal Das v. Brijbhukhan Lal* (4); and he referred to the expressions of the judgments in the House of Lords regarding there being no implied contract to pay interest after, at the same rate as before, written promises to pay on a certain date. It was also contended that the breach of contract took place on the failure to pay on the due date, a failure once and for all. In this view of the case the

1806

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MATHURA  
DAS  
v.  
RAJA  
NARINDAR  
BAHÁDUR.

(1) I. L. R., 17 All., 581

(3) I. L. R., 11 All., 416.

(2) I. L. R., 13 All., 330.

(4) L. R., 22 I. A., 199; I. L. R., 17  
All., 511.

(5) L. R., 7 E. and I. A., 27.

1896

MATHURA  
DASv.  
RAJA  
NARINDAR  
BAHÁDUR.

High Court had held the claim for damages to be barred. Reference was made to Articles 115, 116 and 132, of the Limitation Act XV of 1877.

Counsel for the appellant was not called upon to reply.

Afterwards, on the 31st July, their Lordships' judgment was delivered by SIR R. COUCH :

By a deed dated 17th February 1880, Raja Bhawani Ghulam Pal, the defendant, now represented by the respondents (the first of whom alone defends this appeal), mortgaged and hypothecated a certain mauza to Chhedi Lal, the predecessor in title of the plaintiffs who are now appellants, to secure the principal sum of Rs. 19,157. The deed then proceeded thus: "And I covenant and record that "I shall pay off without any objection the amount in full, principal and interest, at the rate of Re. 1-6-0 per cent. per mensem, "within a year, without raising any objection whatever. If I "fail to pay off the amount within the fixed term, the said bankers "shall be competent to realise the amount by any means possible, "from my person and the properties mortgaged, and from other "properties belonging to me, and I or my heirs neither have nor "shall we have any objection whatever to it. Until the payment "in full of this amount, principal and interest, I shall not transfer "either directly or indirectly, the mortgaged property to anyone "else, and if I do, such a transfer should be deemed to be false "and inadmissible. The amounts paid by me should be first "credited to the payment of interest, and the balance should be "credited to that of the principal, and I shall have them entered "on the back of the document."

No payment having been made, the plaintiffs instituted this suit on 19th June 1888, for the usual mortgage decree. The Subordinate Judge of Gorakhpur passed a decree in the usual form for the sum of Rs. 22,313, being the principal of the loan with one year's interest, and a further sum for costs. The rest of the claim he dismissed. He held on the authority of a decision of the High Court in a similar case that the mortgage-deed does not provide for interest after the first year. Being then pressed to



give damages by way of interest, he held that such a claim being compensation for breach of a contract was barred by Articles 115 and 116 of the Limitation Act.

The plaintiffs appealed to the High Court who affirmed the decision of the Subordinate Judge on both points, and so dismissed the appeal, though without costs. From that decree the present appeal is brought. Supposing the construction put by the Courts below on the deed to be correct, the appellants still ask why they should not recover six years' arrears of interest by way of damages. It is very difficult to see why. The principal debt was not time-barred, and it was not paid. Every day that it remained unpaid there was a breach of contract, and the bar of time applies only to breaches occurring six years before suit.

But it is not necessary to dwell further on this point, because their Lordships think that the Courts below have misconstrued the deed. Indeed they do not find in the judgments any attempt to arrive at the meaning of the deed by an examination of its terms. Both Courts appear to have followed decisions in other cases, according to which it would seem that in the High Court of Allahabad a fixed rule of construction has been laid down for transactions of this kind, without much regard to what the parties have actually said.

The latest case of the kind was decided as late as June 1895, *Narindra Bahádur Pal v. Khadim Husain and others* (1) after the decision of the case now under appeal; but it proceeded on the same judicial lines, and as it was referred to a Full Bench because of a discrepancy between the Allahabad and the Calcutta High Courts, it may be taken as the most authoritative statement of the views of the Allahabad Court.

The instrument to be construed resembled very closely that on which this Board is now engaged. The mortgagor covenanted to pay the principal loan with interest within one year. He then hypothecated land to secure "the said sum of money," and covenanted not to transfer the land "until I pay in full the whole of

1897

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MATHURA  
DAS  
v.  
RAJA  
NARINDAR  
BAHADUR.

1896

MATHURA  
DAS  
v.  
RAJA  
NABENDAR  
BAHÁDUR.

“the amount of principal and interest.” ..... “If I fail to pay the money with interest,” the mortgagee was to recover the said sum of money with interest” from the property. And there was a provision that payments by the mortgagor should be credited, first to interest and afterwards to principal.

Upon that instrument the Court delivered the following judgment:—

“In our opinion the construction of the mortgage-deed admits of no doubt. The term was one year from the 28th of April 1879. The mortgagees could on the expiration of that year sue for and recover the principal moneys remaining due at the expiration of that year; in certain events the mortgagees could before the expiration of that year sue for and recover the principal and interest due at the date of their suit. On the other hand, the mortgagor could, by payment to the mortgagees or into the treasury of the Court of the principal and interest due, redeem the mortgage even before the expiration of the year. The payment of *post diem* interest was not provided for by the mortgage-deed, and certainly, according to the ordinary construction of such deeds in these provinces, which we believe to be correct, was not contemplated by the mortgagor. The conditions in the mortgage-deed binding the mortgagor not to transfer the mortgaged property, and giving the mortgagee power to recover the principal money with interest if the mortgagor failed to pay the principal with interest on the due date, are ordinary conditions commonly inserted in mortgage-deeds in these provinces, whether it is intended that interest shall run only to the due date or shall run not only to the due date but after due date and until the principal sum shall have been paid. Such conditions are never construed in this court as indicating that interest shall continue to run after the due date.”

Now there is not, as the learned Judges seem to imply, any different mode of construing language in the North-West Provinces from that which prevails elsewhere. Conditions in mortgage-deeds must not be disregarded because they happen

to be common ones. If it be true that covenants not to transfer till principal and interest be paid are sometimes inserted, when the intention is only to secure interest for a single year, such intention must be gathered from other parts of the deed itself. If such a covenant, not being controlled by other parts of the deed, does not mean that interest is to run till payment it is very difficult to say what it does mean. The covenant to pay within a year ties up the hands of the mortgagee for that year and protects the mortgagor; but it rarely happens, and is rarely contemplated, that the mortgagor should actually pay by that time. The provision for applying payments to reduction of interest points strongly to the expectation of the parties that the transaction will not be closed when the fixed day of payment arrives. The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a jury or a court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction.

To their Lordships' understanding the meaning of the contract before them is plain enough. The mortgagee cannot, except in certain events, enforce payment for a year. The mortgagor may pay at any time, and is bound to pay in a year's time, "the said amount" (*i.e.*, Rs 19,157 the only amount yet mentioned) "principal and interest," *i.e.*, whatever interest may be due at the time of payment, whether for a year or a less time. If he fails, the mortgagee may proceed to realize "the amount," the obvious meaning of which is, principal and interest to the time of realization. Then comes the covenant not to transfer until payment "of this

1896

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MATHURA  
DAS  
v.  
RAJA  
NARINDAR  
BAHÁDUR.

1896

MATHURA  
DAS  
6.  
RAJA  
NARINDAR  
BAHADUR.<sup>1</sup>

amount", (*i.e.*, the amount to be realized "principal and interest") and then the proviso that payments shall be applied first in reduction of interest, and entered on the back of the document. The strictest construction of the words is in accordance with the usual intentions of the parties to a simple mortgage. Why they should be wrested from that construction in favour of an unusual and most improbable intention is not explained.

Their Lordships hold that the plaintiffs are entitled to recover their principal debt with interest at the rate mentioned in the mortgage-deed, up to the date of the Subordinate Judge's decree, and thereafter at the rate of 6 per cent. per annum. The decree of the High Court should be discharged.

The respondents ought to pay the whole costs of suit in both the Courts below. The case should be remitted to the Subordinate Judge to take the proper accounts, and give further directions.

Their Lordships will humbly advise Her Majesty to this effect. The respondents must pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellants :

Messrs. Ranken, Ford, Ford and Chester.

Solicitors for the respondents :

Messrs. Pyke and Parrott.

1896

August 14.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Knox, Mr. Justice Aikman and Mr. Justice  
Blennerhassett.*

SHAH ABU ILYAS (APPLICANT), v. ULFAT BIBI (OPPOSITE PARTY).<sup>\*</sup>  
*Criminal Procedure Code, sections 488, 489, 490 - Maintenance—Plea of divorce  
in answer to an application for enforcement of an order for maintenance  
of a wife.*

Where in answer to an application for enforcement of an order under section 488 of the Code of Criminal Procedure for the maintenance of a wife, the party against whom such order is subsisting pleads that he has lawfully

<sup>\*</sup>Criminal Revision No. 184 of 1896.