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successfully invoked by the plaintiff. We therefore dismiss the appeal with costs.

An objection has been filed by the respondent under section 561 of the Code of Civil Procedure. It is not pressed and is dismissed with costs.

PRIVY COUNCIL.

P. C. 1906 *June* 27.

LEKHA SINGH AND ANOTHER (DEFENDANTS) *v.* CHAMPAT SINGH AND OTHERS (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioners of Oudh, Lucknow.]

Mortgage—Redemption—Terms of redemption—Covenant by mortgagors to pay interest at the rate of 2 per cent.—Construction.

On the construction of a covenant in a deed of mortgage between Hindus that the mortgagors would on redemption pay interest "at the rate of 2 per cent.," it was held by the Judicial Committee that the expression "2 per cent." meant "2 per cent. per mensem."

APPEAL from a judgment and decree (11th April, 1902) of the Court of the Judicial Commissioners of Oudh which varied a decree (30th January, 1900) of the District Judge of Sitapur by which a decree (14th September, 1898) of the Subordinate Judge of Sitapur was affirmed.

The appeal arose out of a suit brought by the respondents for redemption of a mortgage, dated 14th January, 1867, and the only question on the appeal was at what rate interest was to be allowed to the mortgagees on redemption.

By the mortgage, which was executed in favour of one Bhagwant Singh, now represented by the appellants, it was agreed that Rs. 3,019-10-11 was the amount due on a former mortgage in 1837, and a further sum of Rs. 500 was advanced to the mortgagors, making the total amount of consideration Rs. 3,519-10-11. The property mortgaged was the share (one-third) of the mortgagors in an estate called Tehar.

Among the conditions in the mortgage-deed was the stipulation :—

"That we mortgaged the said Tehar previously mortgaged estate for full 30 years, and when after 30 years we redeem it in

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the *khali fasl* in the month of Jeth we will pay the interest on the whole sum of Rs. 3,519-10-11 at the rate of 2 per cent., together with the principal."

The suit was brought on 27th September, 1897, the plaint reciting the execution of the deed and alleging that "the covenant for payment of interest at the rate of 2 per cent. per month in addition to profits was unlawfully entered in the document" and that both profits and interest ought not to be allowed as unconscionable. The relief sought was redemption on payment of the principal alone, or of the principal together with such interest as the Court thought fit to allow. The only defence material was that redemption should only be allowed on payment of interest at the full stipulated rate.

The Subordinate Judge held that there was nothing unconscionable in the transaction, and gave the plaintiffs a decree for possession of the mortgaged property on payment of the principal sum with interest at 2 per cent. per annum from 14th January, 1867, to the date of payment. That decision was affirmed by the District Judge. On appeal the Court of the Judicial Commissioners (Mr. Ross Scott and Mr. G. T. Spankie), in considering the question of the rate at which interest was provided for in the mortgage-deed, said :—

"The value of the property in suit is stated to be Rs. 50,000 and the defendants have received the profits of it for more than 30 years by way of interest on the sum of Rs. 3,519-10-11. The actual terms of the mortgage deed provide only for the payment of interest at 2 *per cent.* when the principal is paid off at the end of 30 years and there is nothing unreasonable or unfair in supposing that interest at 2 *per cent.* was not intended to be paid yearly or monthly or for any other period than the whole term of the mortgage.

"The terms of the deed are in themselves unambiguous and plain, and apply accurately to the facts, and it should not be assumed that it was the intention of the parties that interest should be payable at the rate of 2 *per cent. per mensem* as contended by the defendants. If the intention was not that interest should be paid at the rate of 2 *per cent.* for the whole period, the provision in the deed as to the payment of interest is void for uncertainty and cannot be enforced.

Although the plaintiffs did not deny that interest at the rate of 2 *per cent. per mensem* was provided for in the deed, they alleged that they were not liable to pay any interest, and I do not think they should, by reason of their allegations being not strictly in accordance with their present contention,

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be made liable to the payment of a very large sum, which they are not liable to pay under the terms of the contract. I would therefore hold that they are liable to pay on account of interest the amount which they are ready to pay, namely, 2 *per cent.* on the principal for the whole term of the mortgage. Had there been an agreement to pay interest at the rate of 2 *per cent. per mensem*, there are no sufficient reasons for finding that such a bargain is unconscionable and should not be enforced. The plaintiffs have relied on the case of *Seth Sita Ram* v. *Arjun Singh* (1), in which their Lordships of the Privy Council held that "without some special agreement or some special custom, the mortgagee should not retain both the usufruct and the interest, but that the usufruct should be treated as in satisfaction of the interest on the mortgage." In the present case a supposed special agreement is the basis of the defendants' claim for interest in addition to the usufruct of the mortgaged property, and if such an agreement were proved, the ruling would not help the plaintiffs in their contention that the defendants are not entitled to both the usufruct and interest."

The Judicial Commissioners allowed the appeal, and gave the plaintiffs a decree for redemption on payment of the principal sum of Rs. 3,519-10-11, together with Rs. 70-7-0, being interest at 2 per cent. on the principal sum.

On this appeal, which was heard *ex parte* :—

L. DeGruyther for the appellants contended that the words "2 per cent." in the clause relating to the payment of interest on redemption meant at the rate of "2 per cent. per mensem," which was the mode in which interest was invariably calculated in India. It was not an equitable construction of the clause to say that Rs. 70 represented the proper amount of interest for so long a time as had elapsed since the mortgage; nor was that the intention of the parties. The Judicial Commissioners themselves say that there was nothing unconscionable in the contract even if the interpretation put on the clause was that now contended for; and the construction put on it by the Judicial Commissioners was erroneous, and contrary to admissions made by the mortgagors in the pleadings.

1906, *June 27th.*—The Judgment of their Lordships was delivered by LORD MACNAGHTEN :—

Their Lordships have considered this case, and they have come to the conclusion that the appellants are right. The expression "2 per cent." in connection with interest undoubtedly means *prima*

(1) Rafique and, Jackson's P. C., Dec. 1892.

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facie 2 per cent. *per mensem*. The other view, that it only means 2 per cent., or Rs. 70 for the whole period, seems almost absurd.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the decree appealed from reversed with costs, and the decree of the District Judge restored.

The respondents will pay the appellants' costs.

Appeal allowed.

Solicitors for the appellants—*T. L. Wilson & Co.*

J. V. W.

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May 9, 10.
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TIRBHUWAN BAHADUR SINGH (REPRESENTATIVE OF DEFENDANT) v. RAMESHAR BAKHSH SINGH (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioners of Oudh, Lucknow.]

Act No. XV of 1877 *(Indian Limitation Act), section* 2, *and schedule II, article* 118—*Act No. IX of* 1871 *(Indian Limitation Act), schedule II, article* 129—*Acquisition of title by apparent adoption not set aside within* 12 *years under Act No. IX of* 1871—*Suit for possession after Act No. XV of* 1877 *in force*—Res judicata—*Decision in former suit—Code of Civil Procedure, section* 13.

Under the ruling in the case of *Jagadamba Chaudhrain* v. *Dakhina Mohun Roy Chowdhry* (1) and the other cases which followed it, the immunity gained by the lapse of 12 years after the date of an apparent adoption does not amount to an acquisition of title within the meaning of section 2 of the Limitation Act (XV of 1877). And this is so whether the alleged adoption was or was not an apparent adoption to which the ruling in the above case would apply if the Limitation Act IX of 1871 were now in force.

The defendant alleged that in 1858 he had been adopted by a Hindu widow, a taluqdar in her own right, to whom a *sanad* had been granted and whose name had been entered in lists 1 and 2 under Act I of 1869. In 1873 he brought a suit against her for possession of the taluq in which the question of the validity of the adoption, which was denied by the widow, was the main issue and was decided in 1878 against the present defendant, who preferred an appeal to the Privy Council which was dismissed on his failure to deposit security for costs. The widow died on 13th November, 1893. On 27th May, 1899, the plaintiff, who had attained his majority in June, 1896, brought a suit for possession of the taluq claiming to succeed as next heir of his grandfather who was the eldest brother of the widow. The defendant, who was in

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(1) (1886) L. R., 13 I. A. 84 : I. L. R., 13 Calc., 308.