

ORIGINAL CIVIL.

Before Mr. Justice Sale.

LALL BEHARY DUTT v. THACOMONEY DASSEE.*

Hindu Law—Damdapat, Rule of—Mortgage decree—Report of Registrar, Confirmation of. 1896
July 10

Where the mortgagee obtained the usual mortgage decree, and on the Registrar's report there was found due on the mortgage a total sum less than double the amount of the principal :

Held, that the mortgagee was entitled to claim further interest at 6 per cent. on the total amount found due by the Registrar, until satisfaction of the judgment debt.

Held, also, that the rule of *damdapat* is not applicable, if it was not applicable at the time when the decree became final and binding.

Semle :—Such time being from the date of the confirmation of the Registrar's report.

Buggoban Chunder Roy Chowdhry v. Pran Coomaree Dassee (1) and *Kanaye Lall Khan v. Anund Lall Dass* (2) followed.

ON 30th May 1879, the husband of the defendant (since deceased) executed a mortgage in favour of the plaintiff of a one-tenth share in certain properties to secure the principal sum of Rs. 12,000 and interest at 15 per cent. per annum.

A decree for partition of the joint estate was made on 18th February 1880 by this Court, and the Official Receiver was appointed Receiver of the joint estate.

On 16th March 1882, the plaintiff instituted this suit, and, on 23rd July 1883, obtained the usual mortgage decree, directing the Registrar to take an account of what was due to the plaintiff on his mortgage, calculating, in addition to any interest up to the date of decree, the amount of interest due during the period allowed for redemption, namely, six months from the date of the decree. It was also provided that, at the expiry of that period, the interest then due should be added to the principal sum, and that thereafter interest should be calculated at the rate of 6 per

* Original Civil Suit No. 155 of 1882.

(1) See *post*, page 906.

(2) See *post*, page 903.

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cent. per annum. In default of payment the mortgage premises were to be sold.

On 20th November 1883, the Registrar in his report found that, at the expiry of the six months, namely, 22nd January 1884, there would be due to the plaintiff under the decree for Rs. 12,000 principal, and Rs. 11,534-0-3 for interest, making in the aggregate Rs. 23,534. The rule of *damdupat* was not then applicable, the interest found due being less than the principal sum. The report was confirmed by effluxion of time, and although default was made in payment of the aggregate amount found due, no immediate steps were taken to carry out the direction for the sale of the mortgaged premises. Subsequently an order was obtained by the plaintiff for the sale of the properties allotted to the defendant, and the properties were sold by the Receiver for the sum of Rs. 55,000. Out of this sum the plaintiff claimed the sum of Rs. 23,534-0-3 with interest at 6 per cent. from the date of the Registrar's report. The defendant contended that the rule of *damdupat* applied, and that by operation of that rule the plaintiff could not receive under his mortgage decree an amount of interest larger than the principal sum scoured by the mortgage.

The plaintiff contended that the amount stated in the Registrar's report was to be regarded now as a judgment debt, and that he was entitled to interest at 6 per cent. on such judgment debt in terms of the decree.

Mr. Jackson and Mr. Bonnerjee for the plaintiff.

The Advocate-General (Sir C. Paul,) and Mr. Dunne, for the defendant.

SALE, J.—This is an application by the defendant for an order that, having regard to the law of *damdupat*, the plaintiff is not entitled to realize and receive more on account of principal and interest under the decree in this suit, dated the 23rd July 1883, than double the amount of the principal sum therein mentioned.

It appears that, on the 30th May 1879, the defendant's husband (since deceased) executed a mortgage in favour of the plaintiff to

secure the principal sum of Rs. 12,000 and interest thereon at the rate of 15 per cent. per annum, the security being the mortgagor's undivided one-tenth share in properties specifically mentioned in the mortgage which formed part of a joint family estate.

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A suit to partition the joint estate was instituted on the 18th of February 1880. In that suit a decree for partition was made on the 2nd of April 1881, and by an order, dated the 26th of May 1881, the Receiver of this Court was appointed Receiver of the whole joint estate. On the 16th March 1882, the plaintiff instituted the present suit, and, on the 23rd July 1883, obtained the usual mortgage decree, which directed the Registrar to take an account of what was due to the plaintiff on his mortgage, the interest to be calculated on the principal sum being at the rate mentioned in the mortgage during the period allowed for redemption, namely, six months from the date of the decree; and it was provided that, on the expiry of that period, the interest then due should be added to the principal sum, and that thereafter interest should be calculated on the aggregate amount at the rate of 6 per cent. per annum; and it was further provided that, in default of payment of the aggregate amount, the mortgaged premises, or such other property as might in the partition suit be allotted to the defendant as the representative of the mortgagor, should be sold.

On the 20th of November 1883, the Registrar made his report, whereby he found that at the expiry of the period of six months, that is to say, on the 22nd January 1884, there would be due to the plaintiff under the decree Rs. 12,000 for principal and Rs. 11,534-0-3 for interest, making in the aggregate Rs. 23,534-0-3.

At this period the rule of *damdapat* was not applicable, the interest found due being less than the principal sum. No exceptions were taken to the report, which became confirmed by effluxion of time, and though default was made in payment of the aggregate amount due under the mortgage, no immediate steps were taken to carry out the direction for the sale of the mortgaged premises.

On the 6th of December 1894, the plaintiff, on notice to the several parties in the partition suit, obtained an order in this suit, whereby the Receiver was directed to sell so much of the immovable properties allotted to the defendant in the partition proceedings as would be sufficient to provide for certain specific pay-

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ments directed by the order, and he was further directed, after making such payments, to apply the balance of the sale proceeds towards payment to the plaintiff of the amount payable to him under the decree made in this suit.

In pursuance of this order some of the properties allotted to the defendant have been sold by the Receiver, and the sum of Rs. 55,000 has been realized as the sale proceeds. Out of this sum the plaintiff now claims to be paid Rs. 23,534-0-3 as the principal sum due under the mortgage decree and the report made thereunder, together with interest thereon at the rate of 6 per cent.

The defendant contends that the rule of *damdupat* applies, and that by operation of that rule the plaintiff cannot receive under his mortgage decree an amount of interest larger than the principal sum secured by the mortgage.

The plaintiff's contention, on the other hand, is, that the report having become final and binding between the parties, the aggregate amount shown in the report is to be regarded as the judgment debt, and that he is entitled to interest thereon at 6 per cent. in terms of the decree.

The question, whether, under these circumstances, the rule of *damdupat* can be held to apply so as to prevent the calculation of interest at the decretal rate on the aggregate amount found due by the report, has been considered and determined in this Court by Wilson, J., on two occasions.

In a mortgage suit, *Bugoban Chunder Roy Chowdhry v. Fran Coomaree Dassee* (1), a decree was made, dated the 1st of March 1880, for an account and sale, with the usual directions for the allowance of interest. The Registrar's report finding what was due for principal and interest is dated the 24th February 1881.

By an order, dated the 4th of September 1888, it was referred to the Registrar to take an account subsequent to the account already taken. The Registrar's second report is dated 17th June 1889.

It would seem that in taking the subsequent account, the whole account was treated as open, and the rule of *damdupat* was applied.

(1) See *post*, page 906.

It does not appear that the question of the application of the rule of *damdapat* was discussed or questioned before the Registrar, but exceptions were taken to the report which were argued on the 10th of February 1890, and in the result the learned Judge held that interest ought to be calculated on the aggregate amount shown in the report, and the report was varied by the allowance of interest which had been disallowed under the rule of *damdapat*. So also in the case of *Kanaye Lall Khan v. Anund Lall Dass* (1),

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(1) *Before Mr. Justice Wilson.*

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KANAYE LALL KHAN v. ANUND LALL DASS.*

The report by Mr. *Belchambers*, Registrar of this Court, was as follows :—

“This was a suit on two mortgages, one English and the other Bengalee, to recover subsequent unsecured advances. By the decree, dated 3rd September 1877, it was referred to me to take (a) an account of the unsecured advances, and (b) an account of what was due on each of the mortgages.

The decree proceeds to direct payment of what may be found due on the first account with interest at 6 per cent., and is to that extent a purely money decree; but as to what may be found due on the second account, it is in the form of a decree for an account and sale, with the usual direction under Rule 555 (2) that interest be allowed at the contract rate until the end of six months from the date of the decree, and be added to the principal sum, and that thereafter interest be computed and allowed on the aggregate amount at the Court rate of 6 per cent.

The decree not having been filed in the Account Department till after the redemption had expired, and the reference thereunder having in consequence been treated as abandoned, the plaintiff applied by summons and obtained an order, dated 4th May 1878, directing the Registrar to take the accounts directed by the decree, and allowing further time for redemption.

I accordingly took the accounts directed by the decree, and by my report, dated the 10th July 1879, found that there was due on the first account Rs. 12,820-6-11, and that there was due on the English mortgage Rs. 21,700 for principal and Rs. 20,335-5-1 for interest, and on the Bengalee mortgage Rs. 20,875-5-3 for principal and Rs. 25,351-14 for interest, that is, interest on equal to the principal sum to the extent of Rs. 4,684-8-9, have been disallowed under the rule of *damdapat*, but was not disallowed, the rule of *damdapat* having been entirely overlooked.

That report, to which no objection was taken, received confirmation by effluxion of time.

* Suit No. 209 of 1887.

(2) *Belchambers' Rules and Orders*, p. 228.

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which was also a mortgage suit, it appears that several years after the Registrar had made his report finding what was due for principal and interest, a fresh reference was made to him to take an account of what was then due. In the course of taking the further account, the question of the application of the rule of *damdupat* was raised and discussed before the Registrar by counsel who appeared for the respective parties, and in his report, dated the 10th of January 1890, which fully sets out the facts, the Registrar states as follows :—

“There can be no doubt that the decree came into full operation on the confirmation of the former report, and was final in all

It appears that prior to the suit, one of the properties comprised in the Bengalee mortgage was sold with the concurrence of the plaintiff, and that another property, also comprised in that mortgage, was taken up by the Government for public purposes, and that the compensation money was held by the Collector of the 24-Pergunnahs.

It also appears that, on the 15th of September 1879, a copy of the decree was, on the application of the plaintiff, transmitted to the Court of the District Judge of the 24-Pergunnahs, and that through that Court the plaintiff realized in execution the compensation money amounting to Rs. 68,857-0-3, which was applied towards satisfaction of what was payable to the plaintiff under the decree, with the result that the amount due on the Bengalee mortgage was fully satisfied, and the amount due in respect of the unsecured advances was satisfied except as to Rs. 78-9-8.

One of the original defendants having died, and execution having been applied for against his representatives and against the surviving defendants, a notice, under section 248 of the Civil Procedure Code, was issued to them, to show cause why the decree should not be executed. The surviving defendant (hereinafter referred to as the defendant) appeared to show cause, supported by an affidavit, in which it is stated, that, subsequent to the decree, the plaintiff obtained possession of the property comprised in the English mortgage, and that execution should be stayed until he accounted for the rents and profits. The Court, after hearing the parties, made the order of reference, dated 12th January 1888.

On the reference under that order the defendant, by his counter-statement of facts, admitted that interest was payable at 6 per. cent. up to the 8th September 1882, when the plaintiff obtained possession of the property comprised in the English mortgage; but submitted, that, inasmuch as the plaintiff had inordinately delayed the proceedings, he had forfeited his claim to subsequent interest; and claimed that the plaintiff should render an account as mortgagee in possession.

respects, except as to the sale of the mortgaged properties. If this view is correct, it follows that the rule of *damdupat* must be treated as inapplicable to the present case."

Exceptions were taken to this report, and it was contended that the Registrar was wrong in treating the original report as final, so as to exclude the operation of the rule of *damdupat*. The learned Judge, however, held that the Registrar was right in refusing to apply the rule of *damdupat* (see the Court Minutes on the 30th March 1890).

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On the 17th of July last, the parties appeared on a summons to settle my draft report made in pursuance of that order. The settlement of the report was twice adjourned at the request of the parties. On the 24th of July, Mr. Roberts appeared for the defendant and raised the question of *damdupat*. It was arranged that counsel should be heard on that question on the 22nd of August. Then, for the convenience of counsel, and afterwards in consequence of Mr. Roberts' illness, there were several postponements.

Finally, on the 22nd of November, the question was argued by learned counsel.

Mr. *Phillips*, who appeared for the defendant, contended, without seeking to disturb the former report so far as it had allowed interest beyond what was allowable under the rule of *damdupat*, that the Court must have considered that it ought not to decree the amount found due by the former report, but some other amount; that the decree was therefore not regarded as final; that, if it had been so regarded, the order of reference would have been in a different form and would have directed an inquiry of what had been received by the plaintiff as mortgagees in possession and provided for a set off; that looking at the form of the order, it must have been intended that the whole inquiry should be re-opened.

Mr. *Henderson*, on the other hand, contended, that, after confirmation of the former report, the decree was a final decree for payment of what was found due by that report; that if it was final as to the amount of interest allowed in excess, it was final in all respects; that it was treated as final when a copy was transmitted to the Court of the District Judge of the 24 Pergunnahs for execution; that it was again treated as final when the order of reference was made, as appears from the form of the order, which directs an account to be taken of what is now due to the plaintiff under the decree; that, if final, it must have the effect of excluding the rule of *damdupat*.

There can be no doubt that the decree came into full operation on the confirmation of the former report, and was final in all respects, except as to the sale of the mortgaged properties. And having regard to the facts upon

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In these cases it was in effect decided that a decree for an account in a mortgage suit, containing the usual directions as to the calculation of interest, is not final until after the report is made and confirmed; that thereafter the original decree and the report taken together operate as a final decree; and that if the rule of *damdapat* was not then applicable, or, if applicable, was not applied, it cannot afterwards be applied so as to prevent calculation of interest on the aggregate amount found due by the report in accordance with the directions contained in the decree.

which the order of reference was made, I also think that all that was intended by that order was that I should see that credit was allowed for what the plaintiff had realized as mortgagee in possession. If this view is correct, it follows that the rule of *damdapat* must be treated as inapplicable to the present case.

The authorities on the subject of *damdapat* are referred to in the case of *Nobin Chunder Banerjee v. Romesh Chunder Ghose* (1); see especially *Balkishen Balchandra v. Gopal Raghunath* (2)."

This suit came again before the Court on 30th March 1890 for argument on exceptions to the report.

Mr. *Phillips* and Mr. *Haldar* in support of exceptions.

Mr. *Bonnerjee* and Mr. *Henderson* contra.

Mr. *Phillips* read the decree and the proceedings and evidence before the Registrar.

WILSON, J.—I do not see any sufficient grounds for interfering with the report of the Registrar. In matters of law, I think he has taken a correct view. In matters of fact, I am not prepared to interfere with his finding in any of them. The report will be confirmed and the exceptions disallowed with costs.

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The report by Mr. *Belchambers*, Registrar of the Court, dated 17th June 1889, was as follows:—

"Whereas by an order of this Court made in this suit, and dated the fourth day of September last, it was referred to me to take an account subsequent to the account already taken of what is due to the plaintiff, Kally Dass Dutt, under the decree made in this suit, and dated the first day

* Suit No. 709 of 1879.

(1) I. L. R., 14 Calc., 781.

(2) I. L. R., 1 Bom., 73.

The principle deducible from these cases is not in conflict with my decision in the case of *Ram Kanye Audhicary v. Gally Churn Dey* (1).

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The ruling in that case is that when, in taking an account

of March one thousand eight hundred and eighty, for principal, interest, and costs up to the fifteenth day of January next, now instant, the usual summonses have been issued and I have been attended by the attorneys for all parties except the defendants A. B. Miller and Brojogopal Bysack [the two last named defendants not appearing either in person or by attorney], and in their presence I have taken the said account, and, having considered the evidence adduced and laid before me, I find and report that there is due to the plaintiff, Kally Dass Dutt, the sum of Rupees five thousand and five hundred for principal, and that there is due to him for interest subsequent to the account already taken and up to the fifteenth day of January last the sum of Rupees three thousand eight hundred and four and one anna and ten pies, which, and the sum of Rupees two thousand five hundred and fifty-one and eight annas and two pies allowed for interest in the said former account, amount together to Rupees six thousand three hundred and fifty-five and ten annas.

I further find and report that there is also due to the plaintiff, Kally Dass Dutt, the sum of Rupees four hundred and forty five for the taxed costs of this suit up to the date of the said decree, and the sum of Rupees two hundred and twenty-six and two annas for interest thereon from the twenty-first day of August one thousand eight hundred and eighty, the date of taxation, to the said fifteenth day of January instant."

Mr. *Evans*.—I move to set aside the report of the Registrar, dated the 6th May 1889, and filed on the 24th July 1889, on the ground that the Registrar has erred in applying the rule of *damdapat* and disallowing a portion of interest claimed. [Reads decree of 1st March 1889, and the order of 4th September 1888.] I submit it was not open to the Registrar to disallow the subsequent interest, which he has disallowed under the law of *damdapat*.

Mr. *Banerjee* (in support of the Registrar's report).—I cannot support the report. I was under the impression that the Registrar in his last report had calculated the interest on the amount in the mortgage, but find he has calculated it on Rs. 8,000 as the principal sum.

WILSON, J.—The result will be that the report will be varied by allowing the interest disallowed. The costs of the application to be added to the claim.
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directed by a mortgage decree, the rule of *damdupat* has been rightly applied in disallowing interest in excess of the principal sum, such application of the rule *before the decree has become final*, operates to prevent effect being given to the direction contained in the decree for the calculation of further interest on the aggregate amount certified to be due by the report.

The cases decided by Wilson, J., shew that when the rule of *damdupat* is not applicable at the time the decree becomes final, the direction that the aggregate amount shown to be due by the report is to carry interest at 6 per cent. must be given effect to. Applying, therefore, the principle laid down by Wilson, J., I must hold that the defendant is not entitled to the order asked for, and that this application must be refused with costs.

Attorney for plaintiff: Babu *Gonesh Chunder Chunder*.

Attorneys for defendant: Babus *Kally Nath Mitter & Surbadhi-carry*.

C. E. G.

TESTAMENTARY JURISDICTION.

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 May 19.

Before Mr. Justice Sale.

IN THE GOODS OF NUNDO LALL MULLICK (DECEASED).

Probate and Administration Act (V of 1881), section 90—Administrator-General's Act (II of 1874), section 31—Transfer to Administrator-General—Executor, Power of disposition by.

Where the executors of a Will transfer their interest in the estate of the deceased under section 31 of the Administrator-General's Act to the Administrator-General :

Held :—

(1) Such a transfer would only transfer such powers of disposition over the estate as the executors themselves possessed.

(2) Under section 90 of the Probate and Administration Act, the power of an executor to dispose of any property is subject to any restriction imposed by the will appointing him.

(3) Where there is no such restriction, the power to dispose is not dependent on the permission of the Court, and the Court has no jurisdiction in the matter.