

penalty, namely, that of being a definite sum which becomes due at once as soon as default is committed. The amount of this part of the claim depends upon, and gradually grows with, the time for which the borrower finds it convenient to retain the use of the principal amount after the due date. It cannot in any sense be regarded as a sum named as the amount to be paid in case of breach of contract within the meaning of section 74 of the Contract Act.

This view is, I think, in accordance with the decision in *Mackintosh v. Crow* (1).

My answer to the second question, therefore, is that section 74 of the Contract Act applies only to that part of the claim for interest which is in respect of the period from the date of the bond to the due date, and that it has no application to the claim for interest for the period from the due date to the date of realization.

A. A. C.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

JAMUNA PARSHAD AND ANOTHER (DEFENDANTS, 2ND PARTY),
v. GANGA PERSHAD SINGH AND OTHERS (PLAINTIFFS),

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AND

HARDHANI LAL (DEFENDANT, 1ST PARTY), v. GANGA PERSHAD
SINGH AND OTHERS (PLAINTIFFS).*

Hindu Law—Joint Family—Mitakshara Law—Mortgage of undivided shares in joint-family property—Consent of co-sharer.

A, B and C together formed a joint Mitakshara family. On the 27th June 1872, A and B, without the consent of C, for their own benefit and without legal necessity, executed a bond in favour of J and I (defendants, 2nd party), mortgaging to them certain joint properties. On the 14th August 1882, J and I obtained an *ex parte* decree on their bond against A, B and

* Appeals from Original decrees Nos. 104 and 127 of 1891, against the decrees of F. W. Badcock, Esq., Judge of Tirhut, dated the 30th of January 1891.

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C, and in execution mauzas Pipra and Bangra were put up to sale on the 16th March 1888, and purchased by *H* (defendant, 1st party). Prior to the institution by *J* and *I* of their suit, *A*, *B* and *C* on the 24th August 1881, together mortgaged mauzas Pipra and Bangra to *N*. On the 13th March 1884, *N* obtained an *ex parte* decree on his mortgage, and in execution thereof mauza Pipra was sold on the 21st November 1884. The plaintiffs purchased the property, and duly obtained possession from the Court. In a suit by the plaintiffs for a declaration that the mortgage of the 27th June 1872 was invalid, and the decree and execution sale upon the basis thereof ineffectual as against them, and for confirmation of possession, and in the alternative that if the mortgage bond was valid that the amount due thereunder and chargeable on mauza Pipra might be determined, and the plaintiffs declared entitled to redeem upon payment of such amount,—*held*, that although *A* and *B* had no authority, without the consent of their co-sharer *C*, to mortgage their undivided shares to *J* and *I*, yet as the plaintiffs derived their title from those mortgagors, they were not entitled to recover such shares without paying to *H*, who by his auction purchase had acquired the rights of the mortgagees, the money advanced on the mortgage bond of 1872 with interest, and that the same was a charge on such shares.

Mahabeer Persad v. Ramyad Singh (1) applied in principle. *Sadabart Prasad Sahu v. Foolbakh Koer* (2) and *Madho Parshad v. Mehrban Singh* (3) distinguished. *Nilakant Banerji v. Suresh Chandra Mullick* (4) referred to.

A JOINT Hindu family, governed by the Mitakshara law, consisted of two brothers, Kishandeo Narain Singh (deceased) and Barhamdeo Narain Singh, and a nephew, Baldeo Narain Singh. On the 27th June 1872, for their own benefit and without legal necessity, the two brothers Kishandeo and Barhamdeo, without the consent of their nephew Baldeo, who was a major at the time, executed a bond for Rs. 2,650 in favour of Jamuna Parshad and Ishri Parshad (defendants, 2nd party), mortgaging to them, among other joint-family properties, taluka Bishanpur, in which was situated mauza Pipra, the property in suit. On the 24th August 1881, Kishandeo, Barhamdeo and Baldeo together mortgaged their joint property in mauzas Pipra and Bangra to one Narsingh Das. On the 25th July 1882, the defendants,

(1) 12 B. L. R., 90; 20 W. R., 192.

(2) 3 B. L. R. (F. B.), 31; 12 W. R. (F. B.), 1.

(3) I. L. R., 18 Calc., 157; L. R., 17 I. A., 194.

(4) I. L. R. 12 Calc., 414.

2nd party, instituted a suit on their mortgage bond against the above-mentioned three members of the joint-family, and on the 14th August 1882 obtained an *ex parte* decree against them for Rs. 7,439-12. In February 1884, Narsingh Das filed a suit on his mortgage bond, which was also decreed *ex parte* against the said three members on the 13th March 1884; and in execution mauza Pipra was sold by public auction on the 21st November 1884. The plaintiffs purchased the mauza and duly obtained possession from the Court. On the 16th March 1888, long subsequent to the date of the plaintiffs' possession, mauzas Pipra and Bangra were put up to sale in execution of the decree of the 14th August 1882, and purchased by Hardhani Lal (defendants' 1st party). This sale was confirmed on the 4th July 1888.

In May 1889 the plaintiffs instituted the present suit against the auction purchaser Hardhani Lal, the members of the joint family (defendants, 3rd party) and the mortgagees Jamuna Parshad and Ishri Parshad.

In their plaint they set out the above facts, and also alleged that the defendant Hardhani Lal was setting up his auction purchase against their title, and was otherwise interfering with their peaceful possession. They alleged that Kishandeo and Barhamdeo were not the managers of the joint family; and submitted that the mortgage of the 27th June 1872, having been executed by them for their own benefit and without the consent of their co-sharer Baldeo, was invalid; that the sale of the 16th March 1888 of mauza Pipra was bad for material irregularities, and on the ground that the property had been improperly sold contrary to the terms of the mortgage decree of the 14th August 1882. The plaintiffs further submitted that the right of a subsequent mortgagee to redeem a prior mortgage could not be affected or taken away by a decree in a suit to which he was not a party; and that as Narsingh Das was not a party to the suit of the defendants, 2nd party, although the latter were fully aware of the fact that his mortgage was in existence at the date of its institution, the said mortgage decree did not bind him, or the plaintiffs who claimed through him, or destroy their lien and right to redeem. The plaintiffs lastly submitted that, under the circumstances of the case, the utmost the defendant Hardhani Lal had acquired by his auction purchase was a charge

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upon mauza Pipra for the amount that might properly be found to be due under the mortgage of the 27th June 1872, and that upon its determination by the Court they were entitled to redeem upon payment of such amount. The plaintiffs prayed that the Court might declare that the mortgage of the 27th June 1872 was invalid; that the decree of the 14th August 1882 was not binding on them; that the sale of the 16th March 1888 might be set aside or declared ineffectual as against them, and the plaintiffs confirmed in their possession; and in the alternative that if the Court was of opinion that the said mortgage was valid, that it might determine the amount due thereunder and chargeable upon mauza Pipra, and declare the plaintiffs entitled to redeem upon payment of such amount.

The defendant Hardhani Lal contended that Kishandeo and Barhamdeo were the managers of the joint family, and that the mortgage of the 27th June 1872 was valid, as it had been executed by them as managers on behalf of, and for the benefit of, the joint family, and Baldeo had also acquiesced in it; that Narsingh Das was fully aware of the existence of the mortgage, and by his conduct in not having redeemed it and allowed execution proceedings under the decree of the 14th August 1882 to result in the sale to him, was bound by them, and the plaintiffs, who claimed through Narsingh Das and the defendants, 3rd party, were estopped from questioning the validity of the mortgage or the decree; that he was a *bona fide* purchaser for value without notice; and that the sale of the 16th March 1888 was a good and valid sale.

The defendants, 2nd party, further urged that the suit as one for redemption was not maintainable, as all persons interested in the mortgaged properties had not been made parties.

The defendants, 3rd party, did not appear.

The issues were as follows:—

- (1) Did the bond of June 27th, 1872, create a valid mortgage; and if so, upon what property?
- (2) Are the plaintiffs bound by the decree of August 14th, 1882?
- (3) Are the plaintiffs estopped from contesting the view taken by the defendants of the effect of the bond and decree?

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|--|----------------------------------|
| (4) Is this suit a fraudulent one instituted by the plaintiffs in collusion with defendants, 3rd party ? | 1892 |
| (5) Can the plaintiff sue to set aside the sale, dated 16th March 1888, on the ground of material irregularity ? | JANGUNA
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| (6) Was there any material irregularity in the publication or conduct of such sale ? | v.
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| (7) Was there any fraud in the conduct of the sale ? | |
| (8) What are the rights of the various parties ? | |

The Judge found that Kishandeo and Barhamdeo were not the managers of the joint family, and that they had borrowed money upon the security of the mortgage of the 27th June 1872 for their own benefit and without the consent of Baldeo. He therefore held, upon the authority of the case of *Sadabart Prasad Sahu v. Foolbansh Koer* (1), that the mortgage was invalid. He also held that the mortgage covered taluka Bishanpur, mauza Pipra and the other villages included therein. The Judge did not try the 8th issue: but decided all the other issues, with the exception of the second part of the first issue, in favour of the plaintiffs, and gave them a decree, declaring the mortgage of the 27th June 1872 and the decree and sale based upon it invalid, setting aside the sale, and confirming the plaintiffs' possession.

The defendant Hardhani Lal appealed to the High Court. The defendants, 2nd party, also filed a separate appeal from this decision. The two appeals were heard together.

Babu *Umakali Mookerjee*, Babu *Hem Chunder Banerjee*, and Babu *Rajendra Nath Bose* for the appellants.

Mr. *C. Gregory*, Dr. *Rash Behary Ghose*, and Babu *Tarapoda Chowdhry* for the respondents.

Babu *Umakali Mookerjee* contended that the mortgage of the 27th June 1872, although executed by two of the three members of the joint family, was in reality a mortgage of joint-family property by the managers, and was therefore perfectly valid. When the suit was instituted upon that mortgage, Baldeo did not resist the claim of the mortgagees on the ground that he had not executed the deed, and a decree was passed against all three members of the family. The appellant Hardhani Lal was no party to the suit.

(1) 3 B. L. R. (F. B.), 31; 12 W. R. (F. B.), 1.

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He was a perfect stranger, and by his auction purchase had acquired a good title to the property in dispute, which the plaintiffs were estopped from questioning. But supposing that the two brothers Kishandeo and Barhamdeo had no power to execute a valid mortgage of the entire joint-family property, the mortgage, so far as their two-third shares were concerned, was perfectly valid. The Full Bench ruling in *Sadabart Prasad Sahu v. Foolbush Koer* (1) did not apply, inasmuch as in the present case the question as to the validity of the mortgage had been raised in the lifetime of the mortgagors, and before their rights had passed to Baldeo or any other person by survivorship. The case of *Mahabeer Persad v. Ramyad Singh* (2) was clearly applicable. That decision had been approved of by the Privy Council in *Madho Parshad v. Mehrban Singh* (3). The appellant's rights, therefore, amounted to this, that he had acquired a good title to the two-thirds shares of Kishandeo and Barhamdeo, subject to the plaintiff's right to redeem them, and had also acquired the right to redeem the remaining third share of Baldeo, over which there could be no doubt the plaintiffs had a mortgage lien. The plaintiff's suit for redemption was not maintainable, because he had not made all the persons interested in the mortgaged properties parties to it—*Nilakant Banerji v. Suresh Chandra Mullick* (4). He further contended that the plaint and evidence disclosed no cause of action.

Mr. Gregory submitted that the cause of action was sufficiently stated in the plaint, which contained a distinct allegation that the defendant, 1st party, was setting up his auction purchase against the plaintiff's title, and was otherwise interfering with their peaceful possession; and that as the defendants had not taken this objection in their written statements or at the trial, no evidence was offered, and they should not be allowed to take it in appeal. He relied upon the Full Bench ruling in *Sadabart Prasad Sahu v. Foolbush Koer* (1), and submitted that the case of *Mahabeer Persad v. Ramyad Singh* (2) had no application;

(1) 3 B. L. R. (F. B.), 31; 12 W. R. (F. B.), 1.

(2) 12 B. L. R., 90; 20 W. R., 192.

(3) I. L. R., 18 Calc., 157; L. R.; 17 I. A., 194.

(4) I. L. R., 12 Calc., 414.

but he contended that if the Court was of opinion that *Mahabeer Persad's* case did apply, and that the plaintiffs had only the right to redeem, and the suit was bad for defect of parties, that the Court should take into consideration the view which the Court below took of the plaintiff's rights in consequence of which it did not try the 8th issue, and not dismiss the suit, but remand it in order that all persons interested in the mortgaged properties might be added as defendants.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

The suit out of which these two appeals arise was brought by the plaintiffs, respondents, on the following allegations, viz. that two persons, Kishandeo and Barhamdeo, who with a third Baldeo, formed a Mitakshara joint family now represented by the defendants, 3rd party, executed in favour of defendants, 2nd party, Jamuna Prashad and Ishri Prashad, on the 27th June 1872, a bond mortgaging certain properties, not very clearly described; that defendants, 2nd party, on the 25th July 1882, brought a suit upon the bond and obtained a decree against the said Kishandeo and Barhamdeo and also against Baldeo, and in execution of that decree improperly put up to sale mauzas Pipra and Bangra, which were purchased by defendant, 1st party, Hardhani Lal on the 16th March 1888; that before the institution of the suit by defendants, 2nd party, Kishandeo, Barhamdeo, and Baldeo in August 1881 mortgaged to one Narsingh Das the mauzas Pipra and Bangra; that Narsingh Das, having on the 13th of March 1884, obtained a decree on his mortgage, caused the mortgaged property mauza Pipra to be sold in execution, and the plaintiffs purchased the same on the 21st of November 1884 and duly obtained possession; that the mortgage to defendants, 2nd party, was invalid and the sale at their instance was irregularly held; and that the defendant, 1st party, was setting up his auction purchase against the plaintiffs and offering opposition to their peaceful possession. And the plaintiffs prayed that the Court might declare that the mortgage bond of the 27th June 1872 was invalid, and the decree and the execution sale upon the basis thereof ineffectual as against them; and that if the Court was of opinion that the said mortgage bond was valid, it might determine the amount of the lien chargeable

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upon Pipra and declare the plaintiffs' right to redeem on payment of such amount.

Defendant, 1st party, resisted the claim on various grounds, and maintained that his auction purchase was valid; and defendants, 2nd party, urged in addition that the suit as one for redemption could not proceed, as persons interested in the other properties mortgaged jointly with Pipra were not made parties to the suit. Defendants, 3rd party, did not appear.

The parties went to trial upon various issues, of which it is necessary to notice here only two, namely, the 1st and the 8th, which were as follows:—

“ 1st.—Did the bond of June 27th, 1872, create a valid mortgage; and if so, upon what property ? ”

“ 8th.—What are the respective rights of the various parties ? ”

In the view which the Court below took of the case, it was not necessary to consider the 8th issue. But it decided all the other issues, except the second part of the first, in favour of the plaintiffs, and gave them a decree, declaring the mortgage of 1872 and the decree and sale based thereon invalid, and confirming the plaintiffs' possession.

Against that decree these two appeals have been preferred by the defendant, 1st party, and defendants, 2nd party. They were heard together, and the points urged were—

first, that the mortgage bond of 1872, though executed by two only of the three joint owners, was binding upon all the three;

second, that at any rate the mortgage was valid as regards the shares of the mortgagors, or that the bond created an equitable charge as regards those shares;

third, that the suit, so far as it was one for redemption, could not proceed by reason of defect of parties; and

fourth, that the plaintiffs had no cause of action.

As to the *first* point, there is no sufficient evidence to show that the two executants of the bond were acting as managers for the joint family. Great stress was laid upon the fact that Baldeo, the remaining member of the joint family, allowed the decree on the bond to be passed against him; but seeing that the suit which

resulted in that decree was instituted after the mortgage to Narsingh, through whom the plaintiffs claim, neither that decree, nor the fact of Baldeo not having objected to the decree being passed against him, would be any evidence against them.

The *fourth* point also must be decided against the appellants, as no such objection was raised in the Court below, though the plaintiffs made a distinct allegation in paragraph 10 of the plaint that their peaceful possession had been interfered with by the defendant, 1st party. If the objection had been taken in time, it might have been met by evidence. We think it too late for the defendants to raise it now.

Upon the *second* point the Court below has decided against the appellants upon the authority of *Sadabart Prasad Sahu v. Foolbush Koer* (1). But we do not think that case settles the present question. It is true that the mortgage here was one by two out of three undivided co-parceners in respect of joint property without the consent of the third, in order to raise money for the benefit of those two and not for that of the family; and it is true also that the Full Bench in *Sadabart's* case held that one co-sharer 'had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint-family property, in order to raise money on his own account, and not for the benefit of the family;' but the question whether the mortgaged interest could be recovered without redemption was expressly left undecided, as the facts were not sufficiently stated to enable the Court to determine that question. Moreover, the question of the validity of the mortgage in *Sadabart's* case was raised by the non-alienating co-parcener, who did not claim through the mortgagor, and to whom the interest of the latter had passed by survivorship; whereas in the present case that question is raised not by persons claiming the mortgagor's interest by survivorship, but by persons claiming the same under a subsequent alienation made by those mortgagors jointly with their co-sharer.

In the case of *Mahabeer Persad v. Ramyad Singh* (2), which was decided after the Full Bench case of *Sadabart Prasad Sahu v. Foolbush Koer* (1), a father and his elder son, without legal necessity,

(1) 3 B. L. R. (F. B.), 31; 12 W. R. (F. B.), 1.

(2) 12 B. L. R., 90; 20 W. R., 192.

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and without the consent of a minor son who was their co-parcener, had mortgaged their joint property, and a suit was brought to set aside the alienation in the lifetime of the mortgagors; and a Division Bench of this Court (Phear and Ainslie, JJ.), while setting aside the alienation in the interest of the minor, directed that on recovery of the property, it should be held and enjoyed in defined shares, and that the shares of the father and his elder son should be jointly and severally subject to the lien thereon of the mortgagors for the sum advanced by them with interest until repayment, the reason for making the loan an equitable charge upon these shares being that a decree without such qualification would have the effect of restoring their property to the father and son, and leaving them at the same time in possession of the money which they had borrowed on its security—a result that would have been contrary to equity and good conscience. The last-mentioned decision was approved by the Judicial Committee in *Mudho Parshad v. Mehrban Singh* (1).

The present case differs from the cases of *Sadabart Prasad Sahu v. Foolbashi Koer* (2) and *Mudho Parshad v. Mehrban Singh* (1) in this, that the mortgage is here sought to be declared invalid by persons claiming under the mortgagors, and not as in those two cases by persons to whom the interests of the mortgagors had passed by survivorship. It differs also apparently from the case of *Mahabeer Persad v. Ramyad Singh* (3) in this, that the persons who would benefit directly by the setting aside of the mortgage are not as in that case the mortgagors themselves, but are persons deriving title from them and their co-sharer jointly. But the persons who would ultimately benefit by the unqualified setting aside of the mortgage would be the mortgagors, they retaining in that case the mortgage money as well as the full value of their interest in the mortgaged property—a result no less contrary to equity and good conscience than if they had retained the mortgage money and the property itself; and therefore, as far as the point under consideration is concerned, the present case does not really differ from that of *Mahabeer Persad*,

(1) I. L. R., 18 Calc., 157; L. R., 17 I. A., 194.

(2) 3 B. L. R. (F. B.), 31; 12 W. R. (F. B.), 1.

(3) 12 B. L. R., 90; 20 W. R., 192.

and should be governed by the principle which was held applicable to that case. We are, therefore, of opinion that though Kishandeo and Barhamdeo, the mortgagors, had no authority, without the consent of their co-sharer Baldeo, to mortgage their undivided shares to defendants, 2nd party, yet the plaintiffs, who derive title from those mortgagors, are not entitled to recover their shares without paying to the defendant, 1st party, who has by his auction purchase acquired the rights of the mortgagees, the money advanced under the mortgage of 1872 with interest, which should be considered as an equitable charge on the said shares. In other words, the only right which the plaintiffs have got as against defendants, 1st party and 2nd party, is the right to redeem.

It was faintly contended before us that mauza Pipra was not covered by the mortgage of 1872; but, having regard to the terms of the mortgage bond, we think the Court below was quite right in holding that such a contention is wholly untenable.

It remains now to consider the *third* point raised before us. The only claim that the plaintiffs are, in our opinion, entitled to make being one for redemption, the suit cannot proceed unless all the persons interested in the properties originally mortgaged in 1872 are before the Court [see *Nilakant Banerjee v. Suresh Chandra Mullick* (1)]. And as those persons have not all been made defendants, we were asked to dismiss this suit for defect of parties. We do not think, however, that that would be the proper order in this case. In the view that the Court below took of the plaintiffs' rights, they were entitled to a declaration that the defendants, 1st party and 2nd party, had no claim against them, and they were entitled to the property in dispute without redeeming the same; and the Court below did not, therefore, consider itself called upon to make any persons parties to the suit who were necessary parties to it if it was a suit for redemption. As, however, that view is in our opinion incorrect, and as the 8th issue raised in the case has now to be decided, we think the proper course to take in this case will be to send the case back to the Court below to try the suit as one for redemption after making all necessary persons parties to it.

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The result is that the decree of the Court below will be set aside, and the case remanded to that Court for trial with reference to the directions contained in this judgment. The appellants will be entitled to the costs of these appeals, only one hearing fee being allowed. Other costs will be in the discretion of the Court below.

Appeal allowed and case remanded.

C. D. P.

Before Mr. Justice O'Keefe and Mr. Justice Anwar Ali.

1892
 March 18.

MEER MAHOMED ISRAIL KHAN (PLAINTIFF), v. SASHTI CHURN
 GHOSE AND OTHERS (DEFENDANTS).*

Muhammadian Law—Wakf—Settlement in favour of the settlor's family with the reservation of a life interest in part or the whole of the income for the settlor—"Charitable"—"Religious."

A wakf in favour of the settlor's children and kindred in perpetuity, with a reservation of a part or the whole of the income thereof in favour of the settlor for his own use during his lifetime, is valid.

Mahomed Ahsanulla Chowdhry v. Amarchand Kundu (1) referred to. *Rasamaya Dhur Chowdhury v. Abul Fata Mahomed Ishak* (2) dissented from.

In the construction of a deed of wakf, the words 'charitable' and 'religious' must be taken in the sense in which they are understood in Muhammadian law.

Two sisters, Azizunnissa Khatun and Kamrunnissa Khatun, were the owners, in possession, of the property in suit, which they held as a *sikmi taluq* under the superior landlord. Azizunnissa owned a 10 annas, and Kamrunnissa the remaining 6 annas share in the property. On 17th Falgoon 1286 B.S. (28th February 1880), the two sisters by two duly registered *wakfnamas*, identical in terms, made *wakfs* of their respective shares in various properties, including the property in suit. They constituted themselves *mutwallis* of their respective shares in the *wakf* properties, and

* Appeal from Appellate decree No. 776 of 1891, against the decree of H. Peterson, Esq., District Judge of Faridpur, dated the 31st March 1891, reversing the decree of Babu Trailokya Nath Mitter, Subordinate Judge of Faridpur, dated the 29th of June 1889.

(1) I. L. R., 17 Calc., 498; L. R., 17 I. A., 28.

(2) I. L. R., 18 Calc., 399.