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paid such purchase money into court the decree which he had obtained has become void by the effect of the statute. This is the view which was taken by a single Judge of the late Court of the Judicial Commissioner of Oudh in the case of *Nilkanth* v. *Mahabir Singh* (1), and there has been no decision so far contrary to that view.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Gokaran Nath Misra.

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SUKH LAL AND OTHERS (DEFENDANTS-APPELLANTS) *v.* MURARI LAL (PLAINTIFF-RESPONDENT).*

Hindu law—Mortgage—Legal necessity, plea of—Decree against father only, son's right to challenge—Interest, rate of—Excessiveness whether good ground for reduction of rate of interest.

Where in a mortgage-deed the rate of interest stipulated was Re. 1-8 per cent. per mensem compoundable every month, *held*, that the rate, though excessive, was not hard and unconscionable and if the consent given by the defendants to the rate of interest stipulated in the mortgage-deed was free and no undue influence or coercion was exercised the appellant cannot be allowed to plead that they should be allowed a relief by way of reduction in the interest agreed upon merely on the ground that the rate is excessive.

Held further, that the plea of legal necessity for a mortgage-debt, incurred on the security of a joint Hindu family property, or for the interest stipulated therein, is available only to such members of the joint family as were not parties to the mortgage-deed, and not to such members as were themselves executants of the same.

Where a decree for sale is obtained on the basis of a mortgage-deed, executed by a Hindu father, against him alone without his sons having been made parties to the suit,

*First Civil Appeal No. 3 of 1925, against the decree of Bhagwat Prasad, Second Additional Subordinate Judge of Lucknow, dated the 1st of September, 1924.

(1) 26 O.C., 345.

with the result that the question of legal necessity, both as to the mortgage-debt and the rate of interest, has not been tried in the suit, the sons are not bound by the decree. It remains perfectly open to them either to get their shares exempted from sale or to have the said question of legal necessity adjudicated upon in a separate suit.

Where a separate oral agreement between the parties to a mortgage-deed is set up by the mortgagor to the effect that the mortgagee agreed to allow the mortgagor credit for certain sums of money spent over some works done by the latter for the former, and the mortgagor adduces parol evidence in proof of the same, the mortgagor is merely showing an agreement relating to a particular manner of the payment and consequent discharge in part of the mortgage-debt and it cannot be said that he is in any way infringing the provisions of section 92 of the Evidence Act.

Messrs. *St. George Jackson*, *H. D. Chandra* and *Anant Prasad Nigam*, for the appellants.

Messrs. *Gokul Prasad*, *Salig Ram* and *Ali Mohammad*, for the respondent.

MISRA, J. :—This is an appeal arising out of a suit for sale brought by the plaintiff-respondent on the basis of a registered mortgage-deed executed by defendants Nos. 1 and 2 and the husband of defendant No. 3. The facts of the case are as follows :—

A registered mortgage-deed was executed in the plaintiff's favour on the 6th of November, 1913 by three persons, all members of a joint Hindu family, named Sukh Lal (defendant No. 1), Nanku (defendant No. 2) and Raja Ram (husband of defendant No. 3) carrying on the work of building contractors in the city of Lucknow. The mortgaged property consisted of four houses situate in mohalla Narhi, city Lucknow. The consideration money stated in the mortgage-deed was Rs. 4,000, but only Rs. 3,960 had actually been paid; Rs. 400 before registration, Rs. 1,000 at the time of registration and Rs. 2,560 on different occasions after registration on various dates mentioned in

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schedule A, consisting of a statement of accounts, attached to the plaint. The rate of interest provided in the deed was Re. 1-8 per cent. per mensem, compoundable with monthly rests. The plaintiff-mortgagee admitted receipt of certain amounts paid towards the mortgage-debt, as shown in the statement of accounts (schedule A) and claimed Rs. 13,621-14-3 as due on the date of the suit, which was the 25th of February, 1924.

Separate written statements were filed on behalf of defendants Nos. 1, 2 and 3. The principal pleas taken in defence were to the effect that out of the consideration stated by the plaintiff to have been paid towards the mortgage debt a sum of Rs. 1,160 shown by him in his schedule of accounts as paid on the 6th of July, 1916, had not been paid, but that the mortgagors had paid a sum of Rs. 1,700 which had not been given credit for by the plaintiff in the statement of accounts filed by him. It was further contended by them that the interest claimed was hard and unconscionable; that at the time when the deed was executed the plaintiff had represented to them that he would charge them at the rate of only Re. 1 per cent. per mensem simple interest; that they had executed the deed on this representation; and that, therefore he was now estopped from claiming more than Re. 1 per cent. per mensem simple interest. The defendants also pleaded further payments to the extent of Rs. 4,022 by way of having erected certain buildings for the plaintiff and effected some repairs and whitewashing to his house for the costs of which he had agreed to give them credit towards the mortgage-debt due from them.

One of the defendants, namely, Nanku defendant No. 2, contested the suit on the ground that the mortgaged property was ancestral, belonging to the joint

Hindu family of which his two sons were also members, and that they too should have been impleaded in the suit. He further contended that the deed was not binding on his sons inasmuch as the money had not been borrowed for the family necessity; and that, in any case, the rate of interest charged was excessive and not justified by legal necessity.

In reply to these contentions raised by the defendants the plaintiff stated that the sum of Rs. 1,160 had been paid by him to the defendants towards the mortgage money and that the defendants had not paid the sum of Rs. 1,700 as alleged by them towards the mortgage-debt in suit. His case was that the latter sum had been paid by defendant No. 1 towards the debt due to his (plaintiff's) deceased brother, Piarey Lal. The plaintiff also denied that the interest stipulated in the deed was hard and unconscionable, or that there was ever any representation made by him regarding reduction of interest such as had been set up by the defendants; and that, in any case such an agreement could not be allowed to be proved under section 92 of the Indian Evidence Act (Act 1 of 1872), inasmuch as it purported to vary the terms of a contract reduced to writing and registered. As to the buildings, repairs and whitewashing alleged by the defendants to have been made by them for the plaintiff, he replied that he had made payments to them separately, and nothing was due to them on that account. Regarding the plea of legal necessity, the plaintiff replied that the money had been borrowed for legal necessity and that the rate of interest was also justified by such necessity. He, however, refused to make the sons of defendant No. 2 parties to the suit.

The findings of the learned Second Additional Subordinate Judge of Lucknow, who tried the suit, were to

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the effect that the sum of Rs. 1,160 had been paid by the plaintiff to the defendants towards the mortgage-debt in suit as alleged by him; that the defendants had paid Rs. 1,700 to the plaintiff towards the mortgage-debt in suit and not towards another debt due from them to the deceased brother of the plaintiff; that the interest claimed by the plaintiff though excessive, was not hard and unconscionable and no relief could be granted to them because the transaction was one made prior to the passing of the Usurious Loans Act (Act X of 1918); and that the defendants could not in face of the terms of the deed be allowed to prove the representation or agreement as to reduction of interest as set up by them. Regarding the payments alleged by the defendants to have been made in the shape of costs incurred by them on account of erecting buildings and effecting repairs and whitewashing for the plaintiff, the learned Subordinate Judge held that the defendants could not be allowed to prove these payments and claim a credit for them, inasmuch as they were separate and distinct from the mortgage transaction and no evidence of such an agreement could legally be given in the present suit. On the question of legal necessity he held that the plaintiff having refused to implead the sons of defendant No. 2 in the suit, no such question arose for determination in the case. In result the learned Subordinate Judge passed a decree for sale of the mortgaged property in lieu of Rs. 14,556-11-8 the sum due to the plaintiff on account of principal, interest and costs of the suit calculated up to the 1st of March, 1924, the date fixed by him for payment of the decretal amount.

The defendants have come up to this court in appeal against the decree of the trial Judge, and the plaintiff has also filed cross-objections.

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The main contentions raised by the appellants in the memorandum of appeal relate to the following points :—

(1) That the interest stipulated in the deed is hard and unconscionable;

(2) that legal necessity for the mortgage-debt as well as for the interest stipulated in the deed has not been established;

(3) that payment of the sum of Rs. 1,160 by the plaintiff out of the consideration of the mortgaged-deed has not been proved; and

(4) that the defendants are entitled to a credit on account of costs of the buildings, repairs and whitewashing, effected by them for the plaintiff.

The point raised by the plaintiff in his cross-objection relates to the payment of the sum of Rs. 1,700, held by the learned Subordinate Judge as proved to have been made towards the mortgage-debt in suit.

We now proceed to deal with each of these points seriatim.

As to the first point we are of opinion that, although interest at the rate of Re. 1-8-0 per cent. per mensem compoundable every month is excessive, we are not prepared to hold that it is hard and unconscionable. We are supported in this view by a recent decision of their Lordships of the Privy Council reported in *Balla Mal and another* v. *Ahad Shah and another* (1). It has neither been alleged nor proved in the case before us that any undue influence was exercised by the plaintiff-respondent in connection with the mortgaged-deed in suit. If the consent given by the defendants to the rate of interest stipulated in the deed of mortgage, was free and no undue influence or coercion was exercised,

(1) 16 A.L.J., page 905.

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the appellants cannot be allowed to plead that they should be allowed a relief by way of reduction in the interest agreed upon merely on the ground that the rate is excessive. The defendants are, therefore, in our opinion bound to pay at the rate, and in accordance with the terms, stipulated in the mortgage-deed. They alleged in the court below that they had executed the deed in suit under a representation made to them by the plaintiff that interest would be charged at the rate of Re. 1 per cent. per mensem simple, but we are in full agreement with the view taken by the learned Subordinate Judge that such a plea is not available to the defendants. In view of the provisions of section 92 of the Indian Evidence Act (1 of 1872) the defendants cannot be allowed to plead any agreement having the effect of varying the terms of the mortgage-deed, which is a deed in writing registered. They cannot legally be permitted to adduce any evidence in proof of such an agreement. We, therefore, hold that the interest as stipulated in the mortgage-deed in suit, must be allowed to the plaintiff-respondent.

As to the second point, we are of opinion that the defendants-appellants, two of whom are themselves executants of the mortgage-deed in suit and the third is a representative of one who was also executant thereof, cannot be allowed to raise the plea of legal necessity either for the mortgage-debt or for the interest stipulated therein. The plea of legal necessity is available only to such members of the joint family as were not parties to the deed. It would be perfectly open to the sons of defendant No. 2 to raise such a plea. It would have been just and proper for the learned Subordinate Judge to implead the sons of defendant No. 2 in the suit as prayed by them in their application of the 12th of April, 1924, but his hands were, to some extent, forced in this matter by the attitude taken by the

plaintiff during the trial. On the date mentioned above, when the application was made by the minor sons of defendant No. 2 for being impleaded in the suit, the plaintiff refused to make them parties to the suit, and the learned Subordinate Judge thereupon rejected the application. The result of this has been that the question of legal necessity, both as to the mortgage-debt and the rate of interest has not been tried in the suit and a door for further litigation has been left open by the unreasonable attitude taken by the plaintiff in the court below. We have not thought it proper to delay the decision in this case by ordering the plaintiff to implead the two minor sons of defendant No. 2 as defendants in the case and to get the question of legal necessity as to the mortgage-debt and rate of interest decided. It would be perfectly open to the minor sons of defendant No. 2 either to get their shares under the circumstances exempted from sale or to have the question of legal necessity as to the mortgage-debt and the rate of interest adjudicated upon in a separate suit. The plaintiff cannot, therefore, by the course he has been advised to take, stop the minor sons of defendant No. 2 from getting an adjudication from the court on this point. As the case stands at present it is not, therefore, necessary for us to decide the question of legal necessity either in regard to the mortgage-debt or the rate of interest stipulated in the mortgage-deed so far as the present defendants are concerned.

[As regards the third point his Lordship after considering the evidence on the point came to the conclusion that the plaintiff had failed to establish that the sum of Rs. 1,160 was paid towards the mortgage-debtor in suit.—EDITOR.]

The fourth point which we have to consider in the case is, whether the defendants are entitled to get a

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credit for the works done by them for the plaintiff in the shape of new constructions, repairs and white-washing. It was contended on behalf of the plaintiff that in face of the registered instrument such payments cannot legally be allowed to the defendants towards the mortgage-deed in suit. The argument was that the agreement set up by the defendants as to costs on account of new constructions, repairs and whitewashing could not be allowed to be proved under the terms of section 92 of the Indian Evidence Act. The learned Subordinate Judge has accepted this contention. But it appears to us that his view in this matter is entirely wrong, and we must reject it. When the defendants are setting up an agreement between them and the plaintiff to the effect that the latter had agreed to allow them credit for these items they are not in any way producing any evidence for the purpose of contradicting, varying, adding to, or subtracting from the terms of the registered deed of mortgage. They are merely showing an agreement relating to the payment and the consequent discharge in part of the mortgage-debt. The case before us falls within the principle of the decision of their Lordships of the Privy Council in *Sah Lal Chand* v. *Indarjit* (1), where it was held that even a statement of fact made in a written instrument could be contradicted, and that the prohibition contained in section 92 of the Evidence Act related to the varying, adding to, subtracting from, or contradicting the terms of a contract in writing. It is clear, therefore, that where the defendants are setting up an oral agreement and adducing parol evidence in proof of the same, showing that a particular sum had been paid towards the mortgage-debt in a certain manner, it cannot be said that they were in any way infringing the provision of section 92

(1) I.L.R., 22 All., 370.

of the aforesaid Act. We are supported in this view of law by a number of decisions of the various High Courts in India, and we would like to refer to only a few of them, namely, *Ramlal Chandra Karmokar and another* v. *Gobinda Karmokar and others* (1), *Ramavatar and others* v. *Tulsi Prasad Singh* (2), *Goseti Subba Raw and others* v. *Varigonda Narasimham* (3), *Kattika Bapanamma* v. *Kattika Kristnamma* (4), *Ariyaputhira Padayachi and others* v. *Muthukomaraswami Padayachi and others* (5), *Ram Bakhsh* v. *Durjan and others* (6), *Lalchand* v. *Indarjit* (7) and *Jagatpal Singh* v. *Harnam Singh* (8), decided by one of us.

In result we allow the defendants' appeal to this extent that the sum of Rs. 1,160 will be deducted from the claim of the plaintiff as shown in his accounts attached to the plaint, to have been paid to the defendants on the 6th of July, 1916, and that a credit will be allowed to them for a sum of Rs. 3,461 as mentioned above.

We now proceed to decide the plaintiff's cross-objections regarding the sum of Rs. 1,700 which has been found by the learned Subordinate Judge as having been paid towards the mortgage-debt in suit. The payment of this sum of Rs. 1,700 is shown by exhibit A7, which is a cheque No. L/37-24240 drawn by the defendant Sukh Lal in favour of the plaintiff on the Allahabad Bank, Limited on the 25th of February, 1922, and its genuineness is admitted by the plaintiff himself. The cheque was cashed by the plaintiff through one of his servants on the 3rd of March, 1922. The plaintiff, however, alleges that this payment was made by the defendant not towards the mortgage-debt in suit but towards another debt

(1) 4 C.W.N., 304.
(2) 14 C.L.J., 507.
(3) I.L.R., 27 Mad., 363.
(4) I.L.R., 30 Mad., 231.
(5) I.L.R., 37 Mad., 423.
(6) I.L.R., 9 All., 392.
(7) I.L.R., 18 All., 168.
(8) 19 O.C., 166.

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which the defendant Sukh Lal owed to his deceased brother, Piarey Lal. The cheque is in the name of the plaintiff himself and we do not see any reason why, if the defendant Sukh Lal wanted to pay any sum on account of the debt due by him to Piarey Lal, the cheque was not drawn in the name of his widow. The story told by the plaintiff is that after cashing this cheque he deposited this amount in the account of the widow of Piarey Lal with the Allahabad Bank. No such account has been shown to us, nor was any filed in the court below. If it was true that such an account existed, no reason is assigned why the plaintiff did not produce the account kept by the widow of Piarey Lal or take steps to produce her account with the aforesaid Bank. The plaintiff asked for time in the court below to produce such an account but his prayer was rejected, and in our opinion rightly. Under order XIII, rule 1 of the Code of Civil Procedure, parties are required to produce all the documentary evidence of every description in their possession or power on which they intend to rely at *the first hearing of the suit*. The plaintiff did not take any steps to produce the accounts on that date and no satisfactory explanation was given as to the delay on his part. Under order XIII, rule 2, no documentary evidence which has not been produced at the first hearing of the suit is to be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the court for non-production thereof. The plaintiff could show no such cause either in the court below or here. In our opinion, therefore, the action of the learned Subordinate Judge was quite justified and the request of the plaintiff was rightly refused by him. Our decision, therefore, on this point is that we entirely agree with the finding of the learned Subordinate Judge and hold that this sum of

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Rs. 1,700 was paid by the defendants to the plaintiff towards the mortgage-debt in suit on the 3rd of March, 1922, the date on which the cheque was cashed.

The office will now prepare an account on the lines indicated in our judgement and a fresh decree under order XXXIV, rule 4 of the Code of Civil Procedure. Six months' time is allowed for payment from this date. The usual rate of interest at Rs. 6 per cent. per annum is allowed to the plaintiff from date of suit up to the date now fixed for payment. No future interest will be allowed after the date fixed for payment. The plaintiff will get his proportionate costs in the court below, and will pay costs of the defendants to the extent that their appeal has succeeded. The parties will receive and pay costs in this court to the extent of their success and failure in appeal.

STUART, C.J.:—I concur.

Appeal allowed in part.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Wazir Hasan.

RAGHUBAR SINGH AND ANOTHER (OBJECTORS-APPELLANTS) *v.* GOKARAN (DECREE-HOLDER-RESPONDENT).*

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Execution of decree—res judicata *principles of, applicable to execution proceedings—Interlocutory orders in the same execution proceedings, finality to be attached to—Limitation in execution proceedings—Judgement-debtor not opposing execution proceedings, effect of.*

Held, that an interlocutory order passed in execution proceedings is final not only in respect of a matter decided by it if such matter is raised again in subsequent execution proceedings, but has also the effect of finality attached to it, if it is passed in continuation of the same proceedings.

* Second Execution of Decree Appeal No. 73 of 1925, against the order of Muhammad Raza, District Judge of Hardoi, dated the 11th of September, 1925.