

failed to establish that he has a right of pre-emption either under clause (1) or clause (2), it follows that he also comes under clause (3), that he and the vendee had equal rights of pre-emption, and that the only course open to the court below was to decide their respective claims by drawing lots. This is the course adopted by the lower court and in my opinion this appeal should be dismissed.

BY THE COURT :—This appeal is dismissed with costs.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.*

INDAR (DEFENDANT-APPELLANT) v. RAGHUBIR SINGH AND TWO OTHERS PLAINTIFFS AND OTHERS (DEFENDANTS-RESPONDENTS).\*

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*Transfer of Property Act (IV of 1882), section 3 and section 6(e)—Transfer of unpaid balance of a mortgage consideration together with interest claimed thereon by way of damages—Actionable claim—Interest, whether an “actionable claim” or “a mere right to sue”—Claim for interest, whether can be transferred—Contract Act (IX of 1872), section 73—Interest, whether recoverable under the Interest Act.*

In a mortgage a portion of the consideration money was left with the mortgagee to be paid to the mortgagor when required but it was not paid when demanded and the plaintiff purchased the mortgagor's right to realize the unpaid balance together with a sum claimed to be payable as interest by way of damages and brought a suit for its recovery.

*Held*, that the defendant was under no contractual liability for the payment of the interest nor can it be said to be payable under the Interest Act; so it could be claimed only

\*Second Civil Appeal No. 126 of 1929, against the decree of Pandit Gulab Chand Joshi, Subordinate Judge of Partabgarh, dated the 8th of January, 1929, upholding the decree of Pandit Dwarka Prasad Shukla, Munsif of Partabgarh, dated the 12th of October, 1928.

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by way of damages under section 73 of the Contract Act. The interest in question cannot be considered to be a "debt" nor can it be regarded as any "beneficial interest in moveable property" and so it cannot be considered to be an actionable claim as defined in section 3 of the Transfer of Property Act. It can, therefore, be regarded only as a mere right to sue within the terms of section 6, clause (e) of that Act and as such it could not be transferred. *Mehdi Abbas v. Muhammad Fakhr-ud-din* (1), and *Sheonandan Lal v. Zainul Abidin* (2), referred to.

The case was originally heard by SRIVASTAVA, J., who referred it to a Bench of two Judges for decision. His order of reference is as follows:—

SRIVASTAVA, J. :—Defendants Nos. 2 and 3 executed a deed of further charge on the 16th of June, 1926, in favour of defendant No. 1 for Rs. 4,000 out of which only Rs. 3,000 were paid and the balance of Rs. 1,000 was left with the mortgagee to be paid by him whenever wanted by the mortgagors. It has been found by the lower appellate court and the finding is not challenged before me that a few days later, on the 19th of June, 1926, the defendants Nos. 2 and 3 demanded the money but it was not paid. The parties are agreed that the plaintiffs in execution of a decree which they held against defendant No. 2 realized a sum of Rs. 377-12-0 from defendant No. 1 out of the sum of Rs. 1,000 which remained with him as unpaid consideration of the deed of further charge. On the 21st of May, 1928, defendants Nos. 2 and 3 sold to the plaintiffs their right to realize the unpaid balance amounting to Rs. 622-4-0 together with Rs. 473-4-0 being interest at 2 per cent. per mensem by way of damages. The plaintiffs as assignees of the rights of defendants Nos. 2 and 3 under the deed of assignment just mentioned instituted the present suit on the 2nd of July, 1928. This suit has been decreed by both the courts below.

The mortgagee defendant No. 1 has come here in second appeal. The appeal on his behalf is confined to the

(1) (1908) 11 O. C., 217.

(2) (1914) I. L. R., 42 Calc., 849.

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amount of Rs. 480-8-0 which represents the amount of interest decreed in favour of the plaintiffs. The only contention urged on his behalf is that the defendants could claim the amount in question only by way of damages and if so, it could not be transferred. The argument urged is that the claim for the principal amount of Rs. 622-4-0 was nothing more than a claim for damages arising out of a breach of contract to lend money and that the interest claimed in respect of that amount is a claim for damages pure and simple. Mr. *Das* the learned Counsel for the defendant-appellant relied upon a decision of Mr. CHAMIER (afterwards Sir EDWARD) CHAMIER in *Mehdi Abbas v. Muhammad Fakhr-ud-din* (1) in which it was held that such a contract did not create a debt. As regards *Sheonandan Lal v. Zainul Abidin* (2), relied upon by the lower appellate court, the contention urged on behalf of the appellant was that in this case the court assumed that the amount in question was a debt. It was argued that the question whether the amount in dispute could be considered to be a debt or not was never discussed or decided in the case and so it could not be regarded as an authority on that point. Be it as it may, the two decisions referred to above are not consistent. The question involved in the appeal seems to me to be one of considerable importance and I consider it desirable that the matter should be decided by a Bench of two Judges.

I therefore certify the case a fit one for being heard by a Bench of two Judges under section 14(2) of the Oudh Courts Act.

Mr. *S. C. Das*, for the appellant.

Messrs. *Haider Husain* and *Har Dhian Chandra*, for the respondents.

STUART, C. J. and SRIVASTAVA, J.:—This is a second appeal against the decision of the Subordinate

(1) (1908) 11 O. C., 217.

(2) (1914) L. L. R., 42 Calc., 849.

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Judge of Partabgarh who affirmed the decision passed by the Munsif of the same place.

The facts are these :—

*Stuart, C. J.  
and Srivas-  
tava, J.*

On the 16th of June, 1926, defendants Nos. 2 and 3 executed a deed of further charge in favour of defendant No 1 for Rs. 4,000. Rupees 1,000 out of the mortgage money was left in the hands of the mortgagee to be paid by him whenever he was required by the mortgagors to do so. It has been found by both the courts below that on the 20th of June, 1926, the defendants Nos. 2 and 3 made a demand for payment of this amount, but the money was not paid. Subsequently the plaintiffs realized Rs. 377-12-0 from defendant No. 1 in execution of a decree which they had obtained against defendant No. 2. On the 21st of May, 1928, the defendants Nos 2 and 3 sold to the plaintiffs their right to realize the unpaid balance amounting to Rs. 622-4-0 together with a sum of Rs. 473-4-0 claimed to be payable as interest by way of damages at the rate of 2 per cent. per mensem. On the 2nd of July, 1928, the plaintiffs instituted the suit which has given rise to the present appeal, on the basis of the abovementioned deed of assignment. It has been decreed by both the courts below. The defendant appellant does not in this appeal contest his liability for the amount of Rs. 622-4-0 the balance of the mortgage money which still remains unpaid. The only point which he has pressed in this appeal is as regards his liability for the amount of interest claimed by way of damages. The contention is that the claim for interest could not be transferred and the plaintiffs could not enforce payment of it under the deed of assignment made in their favour. We are of opinion that the contention is correct and must succeed. The defendant-appellant was under no contractual liability for the payment of the interest in question nor can it be said to be payable under the provisions of the Interest Act. The interest, therefore, can be claimed only by way of

damages under section 73 of the Contract Act. The question is whether such a claim is an actionable claim within the meaning of the definition given in section 3 of the Transfer of Property Act or whether it is a mere right to sue within the terms of clause (e) of section 6 of the Transfer of Property Act. We have no doubt that the interest in question cannot be considered to be a "debt" nor can it be regarded as any "beneficial interest in *moveable* property." It follows that it cannot be considered to be an actionable claim as defined in section 3 of the Transfer of Property Act. It can therefore be regarded only as a right to sue, and as such it could not be transferred.

We therefore allow the appeal to the extent of Rs. 473-4-0 claimed for interest. The rest of the decree of the lower court will stand. The appellant will receive proportionate costs in all the three courts.

*Appeal allowed.*

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