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In these circumstances we are clearly of opinion that there never has been up to the present day an under-proprietary village community in village Mahdaiya, and in consequence there cannot ever have been any such custom as is alleged by the plaintiff, nor can the plaintiff be allowed to fall back on the presumption provided by section 7 of the Oudh Laws Act.

Hamilton and Yorke, JJ.

In our view the learned Munsif rightly held that there was no right of pre-emption in the village and the plaintiff could not claim any right of pre-emption. The learned Civil Judge has accordingly erred in remanding the case to the trial court for decision of the remaining issues. We, therefore, allow this appeal with costs, set aside the order of the lower appellate court and restore the decision of the trial court.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice Ziaul Hasan

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SUNDER LAL AND OTHERS (APPELLANTS) *v* MST. KANIZ ZOHRA BEGUM (RESPONDENT)*

U. P. Encumbered Estates Act (XXV of 1934), section 14(5)—"Contract made in the course of the transaction before December 31, 1916", meaning of—Compound interest accumulating up to 31st December, 1916, if to be treated as principal—Section whether deals with renovations of contract or with original contract.

Sub-section 5 of section 14 of the Encumbered Estates Act contemplates not only a statement or settlement of account but also a contract subsequent to the original transaction provided that the statement of account or contract is made before the 31st December, 1916. The expression "any contract made in the course of the transaction" does not mean a contract made at the time of the transaction, but the use of the word "course" shows that what was intended was that the contract

*First Civil Appeal No. 124 of 1936, against the order of P. Kaul Esq., Special Judge of 1st Grade, Bara Banki, dated the 3rd September, 1936.

by which a certain amount of interest should have been converted into principal should have been made at a time subsequent to the original transaction, while that transaction was in force, but before 31st December, 1916. In other words the sub-section deals with renovations of contract and not with the original contracts.

Messrs. *Radha Krishna Srivastava, B. N. Khanna* and *C. P. Lal,* for the appellants.

Messrs. *Ali Zaheer* and *Habib Ali Khan,* for the respondent.

THOMAS, C.J. and ZIAUL HASAN, J.:—This is a creditors' appeal under section 45 of the United Provinces, Encumbered Estates Act against a decree passed by the Special Judge, first class, Bara Banki, under section 14(7) of the Act.

The claims of the appellants against Mst. Kaniz Zohra, defendant respondent, rested on two transactions. The first was a mortgage made by her in lieu of a sum of Rs.6,500 on the 10th June, 1913, in favour of Dip Chand, predecessor-in-interest of Sunder Lal and Lal Chand, appellants, and Mahesh Prasad, predecessor-in-interest of Amar Nath, appellant. The other was a promissory note for Rs.1,000 executed by the lady on the 19th January, 1925, in favour of Sundar Lal, appellant, and Mahesh Prasad, father of Amarnath, appellant.

The learned Civil Judge gave the appellants a decree for Rs.15,877-9 in respect of the mortgage transaction and of Rs.2,297-7-6 on account of the debt due on the promissory note. With the latter portion of the decree we are not concerned as the appeal relates only to the decree passed in respect of the mortgage.

It appears that the appellant got a decree on foot of the mortgage on the 20th August, 1926, for Rs.27,802-0-3 and Rs.1,475-1-9 costs. Mst. Kaniz Zohra appealed against that decree but the appeal was dismissed and a sum of Rs.594-15 was awarded to the mortgagees as costs of the appeal. Eventually a final decree for sale

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was passed for Rs.28,923-11-6 and Rs.8-9 as costs. The mortgaged property was sold and a sum of Rs.10,234 was realized by the mortgagees by the sale. The mortgagees obtained a personal decree under order 34, rule 6, C. P. C., for Rs.27,155-13-3 on the 22nd October, 1932, and the appellants put forward this sum together with interest as the amount of their claim, before the Special Judge.

The learned Judge held that under section 14(4)(*a*) of the Encumbered Estates Act the appellants could not get by way of interest more than that portion of the principal which was unpaid on the date of the application and that as the principal sum advanced was Rs.6,500 the appellants were entitled to only that amount as interest due till the date of the application under the Encumbered Estates Act. He further held that they were entitled to Rs.1,475-1-9 on account of the costs of the first court in the mortgage suit, Rs.798-15-3 on account of interest awarded by the decree on costs, Rs.594-15 on account of the costs awarded by the Court of appeal and Rs.8-9 on account of costs of the preparation of the final decree for sale, total Rs.15,877-9.

The learned counsel for the appellants contends that the principal amount should not have been taken to be Rs.6,500 originally lent by the appellants to the respondent but that amount together with interest up to the 10th December, 1916. It may be mentioned that the terms of the mortgage deed provided for payment of interest at 1 per cent. per mensem with six-monthly rests. The learned counsel relies on sub-section 5 of section 14 of the Encumbered Estates Act which runs as follows:

> "For the purpose of ascertaining the principal under clause (*a*) of sub-section (4), the Special Judge shall treat as principal any accumulated interest which has been converted into principal at any statement or settlement of account or by any contract made in the course of the transaction before December 31, 1916."

Sub-section 4 is to the following effect:

"In examining each claim the Special Judge shall have and exercise all the powers of the court in which a suit for the recovery of the money due would lie and shall decide the questions in issue on the same principles as those on which such court would decide them subject to the following provisions, namely,—

(*a*) the amount of interest held to be due on the date of the application shall not exceed that portion of the principal which may still be found to be due on the date of the application;

(*b*) the provisions of the Usurious Loans Act, 1918, will be applicable to proceedings under this Act;

(*c*) the provisions of the United Provinces Agriculturists' Relief Act, 1934, shall not be applicable to proceedings under this Act."

The argument of the learned counsel is that the words occurring in sub-section 5—

"any contract made in the course of the transaction"

mean no more than—

"any contract made at the time of the transaction."

He therefore argues that as according to the contract for payment of compound interest, interest was converted into principal for the last time before December 31, 1916, on the 10th December, 1916, all the compound interest that accumulated up to that date should be treated as principal. We are unable to accept the interpretation put by the learned counsel on the expression—

"any contract made in the course of the transaction."

If the intention of the Legislature had been that compound interest on every debt that had accumulated up to 31st December 1916, should be treated as principal, nothing was easier for them than to say so in clear and unambiguous terms. On the other hand the use of the word "course" show that what was intended was that the contract by which a certain amount of interest should have been converted into principal should have been made at a time subsequent to the original transaction, while that transaction was in force, but before

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31st December 1916. The following are the meanings among others, of the word "course" in Webster's International Dictionary—

"The act of running; progress; passage"

"Motion, considered as to its general or resultant direction or its goal;"

"Line of progress or advance."

"Progress considered with regard to time."

"Motion considered with reference to manner; orderly progress."

"Customary or established sequence of events."

Keeping all the above meanings in view it cannot we think be contended with reason that the expression—

"any contract made in the course of the transaction."

means a contract made at the time of the transaction, because the very idea of the word "course" is of progress and not of a particular point. It appears to us that sub-section 5 of section 14 contemplates not only a statement or settlement of account but also a contract subsequent to the original transaction provided that the statement or settlement of account or contract is made before the 31st December, 1916. This provision is analogous to proviso (i) to sub-section (1) of section 3 of the Usurious Loans Act as amended by the Local Legislature by Act XXIII of 1934. In the Imperial Act that proviso runs as follow:

"Provided that in the exercise of these powers the Court shall not reopen any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than twelve years from the date of the transaction."

By the Local Act XXIII of 1934 the word "twelve" was substituted by "seventeen". This amending Act and the Encumbered Estates Act were passed at the same time and were published in the *Gazette* on the same date and as the amended proviso (i) to section 3(1) of the Usurious Loans Act shows that the intention was that subsequent contracts beyond seventeen years of the date of the original transaction were not to be

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interfered with, similarly by sub-section 5 of section 14 of the Encumbered Estates Act the intention was that only those subsequent contracts should be given effect to which were made some nineteen years before the passing of the Act and not those which were made within that period. In other words both proviso (i) to section 3(1) of the Usurious Loans Act and sub-section 5 of section 14 of the Encumbered Estates Act deal with renovations of contract and not with the original contracts.

We therefore agree with the learned Judge of the Court below that only Rs.6,500 should be taken as the principal in this case as no subsequent statement or settlement of account or contract by which interest should have been converted into principal is proved or alleged in the case.

As this was the only point argued in the appeal, the appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL

Before Mr. Justice G. H. Thomas Chief Judge and Mr. Justice Ziaul Hasan

1939 *January*, 17

PRATAP NARAIN AND ANOTHER (PLAINTIFFS APPLICANTS) *v.* BHAGWATI SINGH AND OTHERS (DEFENDANTS OPPOSITE-PARTIES)*

Civil Procedure Code (Act V of 1908), Order 9, rule 13 and Order 34, rule 3—Mortgage—Foreclosure decree passed ex parte*—Jurisdiction of Court to set aside* ex parte *decree under Order 9, rule 13, C. P. C.*

A final decree for foreclosure passed in the absence of the defendant is an *ex parte* decree and as such the provisions of Order 9, rule 13, C. P. C., are applicable to it. Under that order an *ex parte* decree can be set aside if the defendant satisfies the Court that the summons was not duly served on him or that he was prevented by any sufficient cause from appear-

*Section 115 Application No. 192 of 1936, for revision of order of Pandit Kishan Lal Kaul, Civil Judge of Fyzabad, dated the 11th August, 1936.