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as their Lordships understand the expression, but they hold further, in view of the evidence that was given, which they can see no reason for disregarding, that enough was proved to discharge the onus of proof, and to justify a decree in favour of the mortgagees when no evidence in answer was given.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Nicholson, Graham and Jones.*

Solicitors for respondents: *Watkins and Hunter.*

PRIVY COUNCIL.

JEWAN LAL DAGA

v.

NILMANI CHAUDHURI.

J.C.*
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Dec., 12.

Specific Performance—Agreement to Mortgage—Debt of Unascertained Amount—Evidence—Witness refreshing memory—Document excluded from Evidence—Indian Evidence Act, 1872 (*I of* 1872) *section* 159.

If a debtor has agreed to mortgage specified property on specified terms to secure a debt of unascertained amount, without any condition that the amount is first to be ascertained, the creditor is entitled to have the agreement specifically performed, unless there are circumstances which the Court considers sufficient to justify an unqualified refusal to carry out the agreement. The fact that the amount of the debt has been overstated in the agreement, and in a mortgage-deed tendered for execution, does not deprive the creditor of his right to relief. The Court should order an account of the sum due, and the execution of a proper mortgage to secure that sum; the terms of the mortgage should be settled under the direction of the Court.

* PRESENT: Lord Buckmaster, Lord Carson, Lord Darling, Lord Warrington of Clyffe and Sir Lancelot Sanderson.

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Under section 159 of the Indian Evidence Act, 1872, a witness, for the purpose of refreshing his memory, may refer to a book of account kept under his supervision, although it has been excluded from evidence on the ground that it has been produced too late.

Decree of the High Court reversed.

Consolidated Appeal (no. 97 of 1926) from a decree of the High Court (May 22, 1925) reversing a decree of the Subordinate Court of Dhanbad.

On September 21, 1920, the respondent entered into an agreement with one Kedarnath Daga, now represented by the appellants and referred to herein as the plaintiffs, to sell to him a half-share in certain collieries; the agreement provided also for the execution of a deed of partnership. The plaintiff paid to the defendant Rs. 3,50,000 as earnest money. Pending completion the parties worked the collieries and the plaintiff expended large sums in working expenses and in further advances to the respondent. Considerable delay occurring in the completion the plaintiff pressed for security for the sums advanced.

A draft mortgage bond was prepared by the respondent's solicitors which stated the total sum advanced as being Rs. 5,81,567 and mortgaged the collieries to the plaintiff to secure that sum and such further advances as might be made, with interest at 18 per cent. per annum. The terms of this bond were not accepted, but the plaintiff, after some demur, agreed to take a mortgage of the collieries in substitution for the agreement for sale and partnership.

Accordingly a memorandum, dated February 5, 1921, was prepared as to the terms, and was signed by both parties. It provided, inter alia, for interest at 21 per cent. per annum, and that the principal amount secured should be Rs. 5,50,000, any amount due in excess of that sum to be paid on execution of the mortgage.

A draft deed carrying out these terms was prepared and approved by the solicitors of both parties.

The deed was engrossed, and the defendant's solicitors sent the plaintiff's solicitors a cheque for the stamp.

The respondent having failed, in spite of repeated demands, to execute the mortgage, the plaintiff instituted the present suit.

By his plaint he claimed, among numerous reliefs, (*a*) a declaration that the property was mortgaged for Rs. 6,05,642, (*b*) an order for a specific performance of the agreement of February 5, 1921, with execution of the engrossed deed, (*c*) a decree for immediate payment of the amount found due, (*d*) such declarations and decree for specific performance, and otherwise, as the plaintiff should be found entitled to.

The Subordinate Judge passed a decree for the plaintiff declaring that he was entitled to Rs. 5,50,000 with costs at 21 per cent., and ordering that he should have possession of the collieries and work the same until the debt was satisfied.

On an appeal by the defendant, and a cross-appeal by the plaintiff claiming compound interest, the decree was set aside and the suit dismissed. Das J. (with whose judgment Adami J. agreed) found that the true amount due was only Rs. 4,41,650, and was of opinion that the plaintiff was not entitled to specific performance unless he proved that the debt was at least Rs. 5,50,000; he was further of opinion that it was an implied term of the agreement that the accounts should be adjusted before execution of the mortgage could be called for, although the parties had undoubtedly thought that at least Rs. 5,50,000 would be found to be due. The learned judges declined to make a money decree, unless the plaint was amended.

1927, Nov. 10, 11. *Wallach* for the appellants.

The respondent did not appear.

Dec. 12. The judgment of their Lordships were delivered by—

LORD BUCKMASTER.—Their Lordships have not had the advantage of hearing counsel for the respondent on this appeal, but they have carefully considered

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the relevant documents, the evidence and the judgment both of the Subordinate Judge of Dhanbad and those delivered in the High Court of Judicature at Patna, and they think that the appellants are entitled to certain relief refused by the High Court.

The only question now raised relates to the agreement for a mortgage, dated February 5, 1921, and made between Kedarnath Daga, represented by the appellants, and the respondent. It is therefore unnecessary to consider the previous complicated transactions between the parties. The pleadings do not dispute that the purpose of this agreement was to arrange the terms upon which the respondent was to grant a mortgage of property, which had formerly been the subject of an agreement for sale and partnership between the parties. This is indeed made plain by the document which refers to the proposed purchase, and the letters which precede it. Following on the agreement a draft mortgage was in fact prepared purporting to carry out its terms, was approved by solicitors on behalf of the respondent, and the mortgage itself was actually engrossed and the stamp paid for by the respondent.

The property being identified and the terms of the loan being fixed, the document of February 5, constitutes an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry out its terms.

To obtain this equitable relief, together with other claims since abandoned, the plaintiff, represented by the appellants, instituted these proceedings, and the defences put forward upon the only point now material are in substance two: The first, that an adjustment of account between the parties in respect of certain accommodation hundis, signed by the defendant, for the plaintiff's use was contemplated, and that the mortgage was conditional on this being done; and secondly, that the terms of the agreement are unconscionable, oppressive, and substantially unfair. That

accounts were open between the parties may, in their Lordships' opinion, be accepted; the reference on the document itself which provides that money, over five and a half lacs of rupees, is to be paid on the execution of the mortgage itself suggests that the amount of indebtedness of the defendant was not finally fixed.

The Subordinate Judge thought that five and a half lacs were in fact due, and he found this issue in favour of the plaintiff—the High Court have found that the actual amount due was four lacs forty-one thousand six hundred and fifty rupees, and while declining to give the plaintiff any security for this sum, offered him a personal judgment for the amount if he would amend his pleadings by making a definite claim for this relief. This he declined to do, and hence the present appeal.

Their Lordships have not been in a position to decide the question of the true indebtedness between the parties, the materials are not before them for the purpose; for it is plain that to a large extent the evidence would depend upon examination of the books of the various parties and the determination of whether the books themselves were trustworthy documents. There appears to have been the usual regrettable omission on the part of both parties to produce these books within the proper time, and in consequence the learned Subordinate Judge regarded with great suspicion the books the defendant produced, and he refused to allow the plaintiff's books to be put into evidence though he permitted him to refresh his memory by reference to their entries. This procedure has been most adversely commented on by the High Court, who regard the permission of the learned Judge as a wrong exercise of discretion.

Their Lordships, however, think that the learned Subordinate Judge was right in the view he took, and s. 159 of the Indian Evidence Act, 1872, is specific upon the point. The weight of the evidence,

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the objection to the document upon the ground that its not having been produced at the proper time renders its authenticity the subject of suspicion, and all other grounds upon which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice. The High Court state that, in the circumstances, the evidence of the plaintiff was *valueless*, and they accept the defendant's view that the lesser amount only was due at the date of agreement. This controversy, as already stated, their Lordships are not in a position to decide, nor does it now become relevant, since the appellants are prepared to accept the lower figure, though asserting that the higher one is correct.

The real question, however, was not so much the decision as between the two money claims but the determination of the issue correctly stated by the Subordinate Judge in the issues settled on August 24, 1921:

> "Are the properties described in Schedules A and B of the plaint or any of them charged or mortgaged for the claims of the plaintiff or any portion thereof?"

and had the defendant before this asked for determination of the real amount due and submitted to the execution of a mortgage for that sum, the litigation would have been ended except as to the question of amount. The High Court have, however, apparently regarded the question of amount as the determining factor of the whole dispute, and held that the claim for the larger sum was a gross and deliberate fraud and an attempt to fasten on the defendant a liability only due by regarding as given for value accommodation hundis to the extent of 1 lakh 20 thousand rupees.

It is to be noted that no such defence was raised by the defendant. He disputes liability for the lesser sums, alleges that the parties were not ad idem, and relies on the other grounds already mentioned, but he nowhere charges fraud, and it would indeed be difficult

to establish seeing that the defendant was independently represented by solicitors throughout the whole transaction. The agreement as to interest is certainly high, but there appears no trace whatever of the defendant protesting against it, no issue is specifically directed to the point, nor is there any evidence to show that in the circumstances it was so unconscionable that effect ought not to be given to the agreement for payment. Rate of interest must vary with the risk run, of which there is no sufficient evidence, though the defendant himself says in examination in chief :—

" During the last 4 or 5 years I had to pay Rs. 3 lakhs to Rs. 4 lakhs on account of interest. I have to pay at high rate of interest, *i.e.*, at 18 to 24 per cent. per annum since September, 1920. The extent of my debt was Rs. 17 lakhs or 18 lakhs. My debt in September, 1918 or 1919, was Rs. 8 lakhs or 10 lakhs when I used to pay interest at Rs. 9 or Rs. 10 per cent. per annum. Since September, 1920, I have to pay interest at 18 to 24 per cent. per annum to the Hundi Wallas (who lend money on taking Hundis)."

In these circumstances their Lordships find themselves unable to say that the agreed rate was of such a character that they ought not to give effect to the agreement. It is true that in the defendant's evidence he objects to compound interest, but he says in plain terms that the rate of interest of the mortgage of which the memorandum was made on February 5, was settled at 21 per cent. per annum.

In these circumstances their Lordships think that there was a valid agreement charging the property with whatever sum was actually due, together with interest as the agreement provides, and that a proper mortgage ought to be executed to carry out these terms. The terms of that mortgage should be settled under the direction of the Subordinate Judge, but compound interest ought certainly not to be included, for it was never agreed. They have only to add, that the fact that the draft mortgage attempted to go beyond the terms of the agreement in this respect might be a good reason why that particular mortgage should not be executed, but it does not destroy the plaintiffs' claim under the agreement, for nowhere was the binding

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effect of the agreement made conditional on fixing the amount of the debt, so that it would be wholly inoperative unless this was first done, and, indeed, the defendant himself says :

"Nothing was settled as to when there would be adjustment of account."

It was, in effect, an agreement to give a mortgage for the true amount of the indebtedness, whatever this might be; nor does the fact that the action was begun before the account was settled deprive the plaintiffs of all right to relief.

The true relief to which the plaintiff was entitled was (*a*) an account of the amount due, (*b*) the execution of a proper mortgage to secure this sum. (*a*) has now become immaterial, but their Lordships can find no sufficient ground for depriving the appellants of relief (*b*), and as the litigation has been in substance for the protection of the plaintiff's security they think the proper order as to costs is that the plaintiff's and the appellants' costs should be added to the security, and they will humbly advise His Majesty accordingly.

Solicitor for appellants : *H. S. L. Polak.*

APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

1928.

Jan., 4.

MUSAMMAT SHAHZADI BEGUM.

v.

SYED MUHAMMAD QASIM.*

Evidence Act, 1872, (*Act 1 of* 1872), *section* 69, *scope of—section applicable only when Court has exhausted all processes—warrant of arrest, issue of, against a witness—property, attachment of, whether obligatory—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XVI, rule* 10.

* Appeal from Original Decree no. 111 of 1924, from a decision of Babu Kamla Prasad, Subordinate Judge of Muzaffarpur, dated the 26th February, 1924.