APPELLATE CIVIL.

FULL BENCH.

Before Sir Charles Sargent, Knight, Chief Justice, Mr. Justice Candy and Mr. Justice Fulton.

GOPA'L RA'MCHANDRA LIMAYE (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGA'RA'M ANAND SHET MA'RVA'DI, DECEASED, BY HIS SONS AND HEIRS PA'NHA AND DEVA, OF WHOM PA'NHA, DECEASED, BY HIS BROTHER AND HEIR DEVA, ALSO DECEASED, BY HIS SON AND HEIR CHUNILA'L, MINOR, BY HIS GUARDIAN AND ADMINISTRATRIX MOTHER NATHIBA'I KOM DEVA GANGA'RA'M (ORIGINAL DEFENDANTS), RESPONDENTS. * 1895. *March* 14.

Mortgage—Redemption—Dámdupat—Applicability of the law—Account current—State of account.

The operation of the rule of *dámdupat* is excluded in all mortgages the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be.

Shri Ganesh Dhárnidhar v. *Keshavráv Govind* (1) over-ruled.

APPEAL from the decision of Ráo Bahádur G. A. Mánkar, First Class Subordinate Judge of Thána.

This was a suit, so far as is material for the purposes of this report, for redemption and account of a mortgage made in A.D. 1844 for Rs. 250. The plaintiff became the owner of the equity of redemption by purchase on 1st October, 1883. The other facts of the case material to this report are stated in the judgment of Candy, J. The case was reported on another point in I. L. R., 14 Bom., 72.

The Subordinate Judge found that Rs. 1,821-6-10 were due on account of the mortgage.

The plaintiff appealed and the defendant filed cross-objections.

Mánekshá h J. Taleyárkhán for the appellant:—The rule of *dám-dupat* applies to the case—*Shri Ganesh Dharnidhar* v. *Keshav-*

* Appeal, No. 100 of 1891.

(1) I. L. R., 15 Bom., 625.

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ráv Govind[1]; *Hari Mahádji* v. *Bálambhat*[2]. The rule of *dámdupat* is applicable even in the case of mortgages.

Mahádeo C. Apte for the respondent:—Under Hindu law proper, the rule of *dámdupat* applies only to the case of a simple money loan. Even pledges of moveable property are outside the rule; much more, therefore, is a mortgage of immoveable property. In the text books there is a distinction made between ordinary loans and pledges. In the Mayukha two separate chapters are devoted to loans. The first deals with simple loans, and therein the rule of *dámdupat* is expressly mentioned. The other chapter deals with pledges. The word used is *adhi*, that is, something placed in the hands of some person (Stokes' Hindu Law Books, pp. 110-113). The rule of *dámdupat* is nowhere said to apply to *adhi*, and, therefore, as mortgages of immoveable property are *adhi*, it does not apply to them.

The current of decisions of this Court is in favour of our contention—*Bálkrishna Bábáji* v. *Hari Govind*[3]; *Rango* v. *Bálaji*[4]; *Sadhu* v. *Ganu*[5]; *Shankara Bawa* v. *Bábáji*[6]; *Bálambhat* v. *Sitárám*[7]; *Rájárám* v. *Gopál*[8]; *Bápuji* v. *Gangádhar*[9]; *Nárayan* v. *Gangáram*[10]; *Nathubhai* v. *Mulchand*[11]; *Nárayan* v. *Satváji*[12]; *Ganpat* v. *Adarji*[13]; *Rámchandra* v. *Bhimráv*[14]; *Dhondu Jagannáth* v. *Nárayan*[15]. *Shri Ganesh Dharnidhar* v. *Keshavráv Govind*[16] is the only dissenting decision. In the other cases the question of *dámdupat* was raised and was decided according to our contention.

In Bengal the interest was governed by the Usury Laws for a long time. They were repealed by Act XXVIII of 1855, which did not affect the Hindu law as to interest, and there are cases of loans in which the rule of *dámdupat* was applied—*Rameonnoy*

(1) I. L. R., 15 Bom., at pp. 640, 641.
(2) I. L. R., 9 Bom., 233.
(3) I. L. R., 15 Bom., 84.
(4) P. J., 1886, p. 76.
(5) P. J., 1887, p. 215.
(6) P. J., 1881, p. 291.
(7) P. J., 1883, p. 312.
(8) P. J., 1876, p. 229.
(9) P. J., 1877, p. 131.
(10) 5 Bom. H. C. Rep., A. C. J., 157.
(11) 5 Bom. H. C. Rep., A. C. J., 196.
(12) 9 Bom. H. C. Rep., 83.
(13) I. L. R., 3 Bom., 312.
(14) I. L. R., 1 Bom., 577.
(15) 1 Bom. H. C. Rep., 47.
(16) I. L. R., 15 Bom., 625.

Audicarry v. *Johur Lall Dutt*[1]. But there are no cases of mortgage. If there be any rules as to interest in the mofussil of Bengal, they cannot be rules of Hindu law, but they must be superimposed by Regulation XV of 1793.

In Madras there is a special Regulation (XXXIV of 1802) which governs the rate of interest. The rule of *dámdupat* is not known there.

The ruling in *Shri Ganesh Dharnidhar* v. *Keshavráv Govind*[2] was made without consideration of the previous authorities and was based on the decisions in *Nathubhai* v. *Mulchand*[3] and *Dhondu Jagannáth* v. *Náráyan*[4]. But the limitation imposed on interest by those rulings is not a necessary consequence of any principle involved in them. Even if the decision in *Shri Ganesh Dharnidhar* v. *Keshavráv Govind*[2] is correct, that was a suit brought by a mortgagee out of possession, while the present is a suit against a mortgagee in possession, and, therefore, bound to keep accounts.

Mánekshán J. Taleyárkhán, in reply:—The word *ádhi* includes even a loan. Under the Hindu law there is no hard and fast distinction between a loan simple and a pledge. There are, no doubt, contradictory decisions of this Court on the subject. But the principle of the decision, which is that a money-lender should not exact more than is equitable from a needy debtor, holds as good in the case of a mortgage as in the case of a loan. Whether the mortgagee is or is not in possession, does not affect the question. A mortgagee's only right is to recover his money; his position does not differ from that of a person who makes a loan.

The point was argued before a Division Bench composed of Farran and Candy, JJ., which delivered the following judgment referring the point for decision to a Full Bench:—

1894, *August* 28. CANDY, J.:—This is an appeal by the assignee of the equity of redemption against the account taken by the Subordinate Judge in accordance with the directions of this Court to be found at p. 77 of I. L. R. 14 Bombay.

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(1) I. L. R., 5 Cal., 867.
(2) I. L. R., 15 Bom., 625.
(3) 5 Bom. H. C. Rep., A. C. J., 196.
(4) 1 Bom. H. C. Rep., 47.

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In 1766 (A. D. 1844), 60½ bighas and one pánd of the Karkhoda Khár were mortgaged for Rs. 250, on condition that the debt was to bear interest at 18 per cent. per annum, and that the rents and profits should be applied towards payment of the interest and principal. This deed necessitates an account of the rents and profits on the one side, and of the principal, interest and charges on the other.

* * * * *

Plaintiff in his appeal has taken several objections to this account; but a preliminary objection must be noticed, preliminary, though it was only raised at the close of the arguments, and that is, that by the ruling in *Shri Ganesh Dharnidhar Mahárájdev* v. *Keshavráv Govind Kulgavkar*(1), applying the rule of *dámdupat* the mortgagee is entitled to have interest added to the principal at the rate stipulated in the mortgage-deed, and to appropriate the rents and profits received by him in or towards satisfaction of such interest; but that after such appropriation, if the amount of interest *now due* and payable on foot of the mortgage exceeds the amount of the principal, the decree on that part of the claim must be limited to double such principal amount.

In the present case, by the mortgage-bond of 1766 (A.D. 1844), the mortgagee in possession was to make up an account of the interest at the end of every twelve months, and was to pay the Government assessment from the produce, and the mortgagor was to be charged interest on the money spent by the mortgagee on repairs and on a sepoy at Rs. 3 a month, which salary was to be debited to the account, the balance of profits, after paying assessment, repairs and peon's salary as above, being taken towards the principal and interest. The account taken on those terms was to be signed by the mortgagor every year.

Applying the ruling just quoted, if the mortgagee is entitled to have interest added to the principal (Rs. 250) at 18 per cent. (compound) and to appropriate the rents and profits received by him in or towards satisfaction of assessment and other expenses noted above, and the balance in or towards satisfaction of such interest and principal, the same interest being charged on all un-

(1) I. L. R., 15 Bom., pp. 640, 641.

satisfied arrears of assessment and interest, and if after such appropriation the amount of interest now due exceeds the amount of principal, and if the interest now awardable by the decree must be limited to double the original principal, then it is evident that the account found by the Subordinate Judge must be materially amended.

Mr. Apte objected to the application of the rule of *dámdupat*, first, because, he contended, the rule, as shown by the texts (Stokes, pages 110 to 113) applies only to loans in general, and not to pledges, and secondly, because the ruling in *Shri Ganesh* v. *Keshavráv* was given without consideration of a long course of decisions of this Court that the rule of *dámdupat* does not apply to cases of running account between mortgagor and mortgagee.

We are not inclined to agree with the first contention, for the rule has been continually applied to mortgage-debts, and a reference to the texts show that it is included in the section "of pledges." Thus the author of the Vyavahára Mayukha closes this section by quoting two texts of Brahaspati and Yájnavalkya. Thus "Brahaspati:—When land or other [immoveable property] has been enjoyed, and more [than the principal debt] has accrued therefrom, then the principal and interest having been realized, the debtor shall obtain his pledge. Yájnavalkya:—Whenever a debt under mortgage has become doubled by interest, then the pledge shall certainly be returned, whenever double the sum lent has been received."

As to the other contention, it certainly does appear that the ruling of the Division Bench in *Shri Ganesh* v. *Keshavráv* conflicts with previous decisions of this Court. It is unnecessary to quote at length the many decisions in which it is shown that the rule of *dámdaput* does apply to all cases in which the mortgagee has had no possession of the mortgaged property, or in which being in possession he takes the rents and profits in lieu of the whole or part of the interest. In such cases no account is taken on both sides, and, therefore, the rule of *dámdupat* applies. But we are dealing with a case in which there is an account on both sides. In such a case it has been held the rule of *dámdupat* is not applicable:—

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(1) By Westropp, C. J., and West, J., in *Nárayan* v. *Satváji* (1).

(2) By Westropp, C. J., and Melvill, J., in *Rájáram* v. *Gopál* (2).

(3) By Westropp, C. J., and Kemball, J., in *Shankarabawa* v. *Bábáji* (3).

(4) By West and Nánábhái, JJ., in *Bálambhat* v. *Sitárám* (4).

(5) By Sargent, C.J., and Birdwood, J., in *Rango* v. *Báláji* (5).

It is noteworthy that the decisions in the cases marked above (1), (2) and (5) purport to be founded on the decision of Couch, C. J., and Newton, J., in *Nathubhai* v. *Mulchand* (6), while the decision in the case marked (3) is based on the decision in the case marked (1), which itself, as just remarked, is based on the case of *Nathubhai* v. *Mulchand*. On the other hand, it is to be remarked that in the judgment in *Shri Ganesh* v. *Keshavrav* the decision in *Nathubhai* v. *Mulchand* is equally relied on. But, it is said, the ground of equity upon which the rule, laid down in that case, is rested, does not justify a decree in favour of a mortgagee for more than double the amount actually advanced; it only prevents the rents and profits being deducted from the amount so doubled. So here, assuming that the rents and profits have paid off all charges on account of assessment and other expenses, and all arrears of the same with interest, then the amount payable on foot of the account cannot exceed Rs. 500.

As against the five cases noted above, in which it was held that the rule of *dámdupat* was inapplicable, because they were cases of accounts on both sides, reference may be made to the case of *Bápuji* v. *Gangádhar* (7), in which the District Judge on the authority of the ruling in *Nathubhai* v. *Mulchand* held that the rule of *dámdupat* was inapplicable to a case of running account, but on appeal to the High Court, Melvill and West, JJ., said: "Under the terms of the mortgage there was nothing to prevent the defendants from causing the mortgaged property to be applied to the liquidation of the debt whenever the amount of interest due became equal to the amount of the principal. Under

(1) 9 Bom. H. C. Rep., 83.
(2) P. J., 1876, p. 229.
(3) P. J., 1881, p. 291.
(4) P. J., 1883, p. 312.
(5) P. J., 1886, p. 76.
(6) 5 Bom. H. C. Rep., 196.
(7) P. J., 1877, p. 131.

these circumstances we consider that there is no injustice in following the previous rulings of the Court which make the rule of *dámdupat* applicable to such cases."

Such being the various rulings on this important point, we do not think it advisable to express an opinion on the merits of the contention raised before us. We, therefore, adjourn the hearing of this appeal till November, when the Chief Justice, Sir C. Sargent, will be sitting in this Court, and when, if he so directs, the question can be considered by a Bench of three Judges.

The case was fixed for hearing before a Full Bench consisting of Sargent, C. J., and Candy and Fulton, JJ.

Mánekshá J. Taleyárkhan, for the appellant (plaintiff).

Dáji Abáji Khare, for the respondent (defendant).

The judgment of the Full Bench was delivered by

SARGENT, C. J.:—The leading case as to the application of the Hindu law of *dámdupat* to mortgages is that of *Nathubhai Pánáchand* v. *Mulchand Hiráchand* (1). Sir R. Couch, in delivering the judgment of the Court, referred to several cases in which the question had arisen, and came to the conclusion that the law was applicable to mortgages "where there is no account on both sides and no charge for rents and profits, but that it would be inequitable that the interest should cease when it amounts to the same sum as the principal, if the rents and profits continue to be charged." Alluding to the circumstances of the case before him where the mortgagee had been in possession of a shop for several years, Sir R. Couch says: "As the mortgagee is to be charged with rents and profits it would not be just to stop his interest, and, consequently, the rule of Hindu law cannot be applied." The exception so enunciated to the application of the law of *dámdupat* has, we cannot doubt, been always understood as excluding the law whenever an account had to be taken between the parties of interest on the one side and rents and profits on the other. This is clear from a series of cases beginning with *Náráyan* v. *Satváji* (2), where Sir Michael Westropp, referring to the remarks of Sir R. Couch in the above case, treats that case as deciding that the law is applicable to mortgages "if there was only an account to be taken of principal and interest due on the

(1) 5 Bom. H. C. Rep., 196. (2) 9 Bom. H. C. Rep., 83.

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mortgage and no account of rents and profits on the other side." In *Rájárám* v. *Gopál*(1), Westropp, C. J., and Melvill, J., say, referring to the above decision of Sir R. Couch in *Nathubhai Pánáchand* v. *Mulchand Hiráchand*(2), that the rule of *dámdupat* would have been applicable if the mortgagee had not been accountable for rents, and the decree passed by the Court shows that the application of the rule was treated as quite independent of the result of the account. The cases—*Náráyan* v. *Satváji*(3), *Bálambhat* v. *Sitárám*(4), *Rango* v. *Báláji*(5)—are further illustrations of the application of the exception so understood to the Hindu law of *dámdupat*. It is true that in the case of *Bápuji* v. *Gangádhar*(6) the law of *dámdupat* was applied in the case of a running account, but the Court (the members of which had all taken part in the decisions above cited) relied in that case on a particular term in the mortgage which the Court considered would prevent any injustice in applying the rule and did not dispute the correctness of the previous rulings. In *Shri Ganesh Dharnidhar* v. *Keshavráv*(7) the Court for the first time treated the application of the rule enunciated in the case of *Nathubhai Pánáchand* v. *Mulchand Hiráchand*(2) as depending on the state of the account when taken—holding that the equity upon which it was grounded did not justify its application, if after the rents and profits received by the mortgagee were appropriated to the interest there was a balance of interest still due exceeding the principal, and that the decree on that part of the claim must be limited to double the principal amount. We think that this distinction cannot be reconciled with the judgment in the case of *Nathubhai Pánáchand* v. *Mulchand Hiráchand*(2), as it has been uniformly understood and acted upon since 1868, and that the long course of decisions requires us to hold that the exclusion of the law of *dámdupat* in the case of mortgages depends on there being an account current between the parties and not upon the state of the account.

(The Full Bench having decided the point of *dámdupat*, the case was sent back to the Division Bench for decision on the merits.)

(1) P. J., 1876, p. 259.
(2) 5 Bom. H. C. Rep., p. 196.
(3) 9 Bom. H. C. Rep., p. 83.
(4) P. J., 1883, p. 312.
(5) P. J., 1886, p. 76.
(6) P. J., 1877, p. 131.
(7) I. L. R., 15 Bom., 625.