APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

1896.
September 10.

HARILA'L GIRDHARLA'L (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* NA'GAR JEYRA'M (ORIGINAL PLAINTIFF), RESPONDENT.*

Dámdupat—Mortgage—Mortgage by Mahomedan to Hindu—Assignment of mortgaged land by mortgagor to Hindu assignee—Subsequent suit by mortgagee against assignee—Amount of interest allowed—Liability of land.

A., a Mahomedan, having in 1869 mortgaged certain land for Rs. 61 to B., a Hindu, afterwards assigned it to C., who was also a Hindu. At the date of this assignment the interest due on the mortgage (Rs. 122-15-10) was much more than the principal debt. B. (the mortgagee) subsequently sued A. and C. for Rs. 270, being Rs. 61 for principal and Rs. 209 for interest. A. did not appear. C. contended that the plaintiff and himself being Hindus the law of *dámdupat* applied and that only as much interest as principal could be recovered. The lower Courts passed a decree for the principal (Rs. 61) together with all interest due at the date of C.'s purchase. They disallowed subsequent interest, as the amount then due was already more than *dámdupat*. On appeal to the High Court,

Held (confirming the decree) that C. was not personally liable to pay anything at all, but that the land which he had purchased was charged with the amount due at the date of his purchase. Unless, therefore, he wished the land to be sold, he should pay that amount.

The rule of *dámdupat* did not apply in this case to the original mortgagor, who was a Mahomedan. He charged the land with a debt which included principal and interest, and he and his land were liable for both. He could not by any assignment prejudice his creditor or reduce the amount due to him, nor could he by assigning his land to a Hindu free it from any charge that existed on it at the date of the assignment.

SECOND appeal from the decision of Ráo Bahádur Lálshankar Umiyáshankar, First Class Subordinate Judge of Surat, confirming the decree of Ráo Sáheb L. P. Párekh, Subordinate Judge of Dholka.

The plaintiff (mortgagee) sued to recover Rs. 270 due on a *san*-mortgage bond passed to him on the 16th May, 1869, by Hasan Beg (defendant No. 1). Of the sum claimed, Rs. 61 was for principal and Rs. 209 for interest. Subsequently to the above mortgage Hasan Beg on the 30th April, 1888, had again mortgaged the property in question by a registered deed of mortgage to Sháh Harilál Girdharlál (defendant No. 2) to whom on the 16th May he also sold the equity of redemption.

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Defendant No. 1 did not appear.

Defendant No. 2 pleaded that his mortgage had priority to the plaintiff's mortgage, and that in any case the plaintiff could not under the rule of *dámdupat* recover more than double the amount of the principal debt (Rs. 61).

The Subordinate Judge held that the plaintiff was entitled to a decree, but only allowed the amount of interest which had accrued due up to the date (30th April, 1888) at which the second defendant had become mortgagee, *viz.*, Rs. 122-15-10. As the amount of interest then due was more than the principal sum (Rs. 61) he disallowed all subsequent interest. He, therefore, passed a decree for the plaintiff for Rs. 183-15-10. On appeal by defendant No. 2, the Judge confirmed the decree.

Defendant No. 2 preferred a second appeal.

Govardhanrám M. Tripathi, for the appellant (defendant No. 2) :—The question relates to *dámdupat* interest. The transaction in dispute was a *san*-mortgage, which is a mortgage without possession. The original debtor and mortgagor was a Mahomedan. He assigned the mortgaged property subject to the mortgage to defendant No. 2, who is a Hindu. The plaintiff is also a Hindu. Therefore the dispute now lies between Hindus, and the rule of *dámdupat* applies. The Judge has awarded interest, which is more than *dámdupat*, on the ground that up to the time that we obtained the mortgaged property the debtor was a Mahomedan to whom the rule of *dámdupat* did not apply. But the claim now is by a Hindu against a Hindu, and the rule is that a Hindu creditor cannot be allowed more than *dámdupat* against a Hindu debtor. The fact that originally the debtor was a Mahomedan cannot affect the present claim or the application of the rule—*Dhondu Jagannáth* v. *Náráyán Rámchandra* (1); *Khushálchand* v. *Ibráhim* (2).

Gokuldás K. Párekh, for the respondent (plaintiff) :—We originally dealt with a Mahomedan debtor, and the right which we acquired against him cannot subsequently be diminished by his making an alienation in favour of a Hindu. So far as we are concerned, defendant No. 2 stands in the shoes of our Maho-

(1) 1 Bom. H. C. Rep., 47. (2) 3 Bom. H. C. Rep., A. C. J., 25.

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medan debtor, and is subject to all his liabilities. Further, what is primarily liable under the transaction is the property and not the person of the debtor, and that being so, it is not open to defendant No. 2 to say that he is not liable to pay more than *dámdupat* because he happens to be a Hindu.

[FARRAN, C. J.:—Does a *san*-mortgage create any personal right against the debtor?]

It does. But in the present case that right is time-barred. The personal right is in addition to the right against property. Under section 26 of Regulation IV of 1827, the law to be applied is the law which governs the defendant. The real defendant in the present case is defendant No. 1, and he being a Mahomedan, the rule of *dámdupat*, which is a rule of Hindu law, is not applicable. The decision in *Dáwood Durvesh* v. *Vullubhdás* (1) is in point. We are clearly entitled to recover more than *dámdupat* on account of interest.

FARRAN, C. J.:—In this case the plaintiff sued to recover Rs. 270 as due on a *san*-mortgage-bond passed to him by the first defendant. He joined the second defendant as the purchaser of the equity of redemption. The first defendant is a Mahomedan, the second defendant is a Hindu.

The plaintiff claimed Rs. 61 for principal and Rs. 209 for interest from the date of the mortgage. The defendant No. 2 contended that under the rule of *dámdupat* he was not liable to pay more than double the amount of the principal. The Judge of the lower Court awarded Rs. 183-15-10, *viz.*, Rs. 61 for principal and Rs. 122-15-10 for interest down to the date of defendant No. 2's mortgage. He disallowed interest after that date, as the debt had been more than *dámdupat* on that date. The plaintiff has not objected to the amount so awarded to him, and we, therefore, express no opinion as to whether that amount is all that he can legally claim.

The defendant No. 2 only has appealed, urging the same contention as in the lower Court. We are of opinion that the decree must be confirmed. The case of *Gopál* v. *Gangárám* (2) shows that the rule of *dámdupat* as acted upon in this Court

(1) I. L. R., 18 Bom., 227. (2) I. L. R., 20 Bom., 721.

does not in all cases prevent land in the hands of a Hindu being subject to a claim for interest in excess of the amount of principal. In the present case, however, the mortgage was by a Mahomedan, to whom the rule of *dámdupat* did not apply. See *Dáwood Durvesh* v. *Vullubhdás*[1]. He had charged his land with a certain debt, and that debt included both principal and interest. The mortgagor, therefore, and his land were liable both for the principal and for the interest. The mortgagor could not by any assignment prejudice his creditor or reduce the amount due to him, nor could he by assigning his land to a Hindu free it from any charge that existed on it at the date of the assignment. The defendant No. 2 is not personally liable to pay anything at all, but the land that he has purchased is charged, and is liable to be sold if the charge is not paid. Unless, therefore, defendant No. 2 wishes the land to be sold, he must pay the amount that was charged upon it when he purchased.

We confirm the decree with costs. In default of payment of the decretal amount and the costs within six months from this date, plaintiff can apply for the sale of the land.

Decree confirmed.

(1) I. L. R., 18 Bom., 227.