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The transaction, therefore, amounts to this. There was an original debt advanced on (as the *ruzukhátas* show) compound interest, and the sum now due at the foot of the account is Rs. 28½. How much of this due for prinsipal and how much for interest is a matter of calculation, but the interest recoverable by suit is limited by the amount of principal originally advanced. This decision is in accord with that in *Motilal* v. *Shivram* (Second Appeal No. 43 of 1894) not reported.

The first and second questions should be answered in the negative, the third also in the negative, the amount of interest recoverable by the plaintiff being limited by the principal amount due on the original transactions.

Order accordingly.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

1896. October 13.

BALKRISHNA INDRABHAN (ORIGINAL DEFENDANT), APPLICANT, *v.* MAHADEO BABAJI KULKARNI (ORIGINAL PLAINTIFF), OPPONENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), Secs. 12, 13, 53 and 54—Mortgage—Profits in lieu of interest—Loan not secured—Provision that mortgage not to be redeemed until unsecured loan paid off—Mortgage paid off out of profits—Balance of profits applied to interest on loan—Special Judge, power of, to vary decree—Review.

A lent B Rs. 150 for which B gave him a bond, dated 6th July, 1872. Of this loan Rs. 100 were advanced on the mortgage of certain land, and the bond contained the terms of the mortgage, one of which was that the profits of the land were to be taken by the mortgagee in lieu of interest on the Rs. 100. The remaining Rs. 50 of the loan unsecured by the bond were made repayable with compound interest at Re. 1-8-0 per cent. per mensem. The bond further provided that the mortgage should not be redeemed until the latter sum of Rs. 50 with interest should be paid off. B sued for redemption of the mortgage. The first Court found that the mortgage had been paid off, and ordered redemption on the plaintiff paying Rs. 50 with interest, which under the rule of *damdupat* increased the amount to Rs. 100. The plaintiff applied to the Special Judge for review on the ground that he had already paid the Rs. 50. The Special Judge

* Application, No. 174 of 1896, under Extraordinary Jurisdiction.

did not review the case on that ground, but acting under the power given him by sections 53 and 54 of the Dekkhan Agriculturists' Relief Act varied the decree by ordering redemption on payment of Rs. 50 only, holding that as the mortgage had been long since paid out of profits, the balance of such profits should be applied to payment of the interest due on the Rs. 50. On appeal to the High Court,

Held, that the Special Judge had jurisdiction *proprio motu* under the provisions of section 53 to vary the decree of the lower Court while not reviewing the case on the ground applied for by the plaintiff.

Held, also, that the Courts while inquiring into the merits of a case under section 12 of the Dekkhan Agriculturists' Relief Act had authority under section 13 to treat the original advance of Rs. 100 and Rs. 50 as a single transaction and to set aside the agreement of the parties to treat part of the loan as a mortgage loan and part as an unsecured loan, and to deal with the whole case (as in substance it was) as an advance on a mortgage.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Khán Bahádur Nowroji Dorabji, Acting Special Judge under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879).

Suit for redemption of a mortgage dated 6th July, 1872.

The bond which contained the mortgage, was given to secure a loan of Rs. 150, and it provided that only Rs. 100 of that sum should be deemed to be advanced on the security of the land thereby mortgaged, and that in lieu of interest on that sum of Rs. 100 the mortgagee should take the profits of the said land. The remaining Rs. 50 of the loan were, by the bond, made repayable with compound interest at Re. 1-8-0 per cent. per mensem, and it was provided that the mortgage should not be redeemed until this sum of Rs. 50 and interest should be paid off.

The Subordinate Judge found that the mortgage-debt had been already paid off out of the profits of the land; and he ordered redemption on payment of Rs. 50 with interest, which under the rule of *dámdupat* made a total sum of Rs. 100 to be paid by the plaintiff.

The plaintiff applied to the Special Judge for review on the ground that he had repaid the Rs. 50. The Special Judge did not review the case, but varied the decree by directing redemption on payment by the plaintiff of Rs. 50 only, holding that as

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the mortgage-debt had long since been repaid out of the profits of the land, the balance of such profits ought to be applied in reduction of the interest which had accrued due on the Rs. 50.

The defendant applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling on the plaintiff to show cause why the decision of the Special Judge should not be set aside on the grounds that the decision was against the provisions of the Dekkhan Agriculturists' Relief Act as interpreted by the decisions of the High Court, that the Special Judge was wrong in applying the profits enjoyed by the defendant as mortgagee to the payment of interest on the unsecured amount, and that the effect of the decision was to compel the mortgagee to refund profits enjoyed by him under the terms of the bond, which was passed long before the Dekkhan Agriculturists' Relief Act came into force.

Mahadev B. Chaubal appeared for the applicant (defendant) in support of the rule:—The Judge was wrong in appropriating the profits enjoyed by us to the payment of interest on the unsecured debt. There were two debts due to us: one secured by a mortgage, the other not secured. The two debts are quite distinct though there is only one bond. And the terms of the bond relating to the mortgage do not apply to the other debt. Under the bond the mortgagee is entitled to the profits of the land until redemption, but the Special Judge has applied part of the profits towards the payment of the unsecured debt. The effect of that is, that the mortgagee has to refund profits to which he is entitled under the terms of the mortgage executed long before the Dekkhan Agriculturists' Act came into force. The ruling in *Janoji* v. *Janoji* [1] is an authority that such a thing cannot be done. If there had been only the mortgage-debt, then in taking an account of the profits the Court could not have ordered any refund. The plaintiff did not contend that the debts should be considered as one. In his application for revision before the Special Judge, the plaintiff sought to get himself absolved from liability on grounds other than those given by the Judge. The Judge was wrong in making out a new case for the plaintiff—*Gorakh Babaji* v. *Vithal* [2].

(1) I. L. R., 7 Bom., 185. (2) I. L. R., 11 Bom., 485.

Sadashiv R. Bakhle, for *Balaji A. Bhagavat*, for the opponent (plaintiff) showed cause:—The Judge was right under sections 12 and 13 of the Agriculturists' Relief Act (XVII of 1879). Courts are at liberty to inquire into the history of the transaction. The Judge did so, and he found that in fact the sum of Rs. 150 was one debt, and not two separate debts, as would appear from the bond. Regarding the debt as a single debt and the transactions as a single transaction, the Judge was right in dealing with the accounts as he did.

As to the objection that the Special Judge should have decided only the points raised in the plaintiff's application for review and should not have gone into other questions, we submit that the powers of the Special Judge under the Dekkhan Agriculturists' Relief Act are wider than those of other Courts. He is a Court of revision, and in that capacity he can vary the decree *proprio motu* under the provisions of section 53 of the Act. His jurisdiction is not limited to the points taken before him.

FARRAN, C. J.:—We are of opinion that we ought not in this case, in the exercise of our extraordinary jurisdiction, to interfere with the order of the Revisional Judge.

The plaintiff sued to redeem a mortgage dated the 6th of July, 1872. The bond which contained the mortgage was given to secure an advance of Rs. 150. It provided that of that sum Rs. 100 should be deemed to be advanced on the security of the mortgaged land, the profits of which were to be taken by the mortgagee in lieu of interest on that sum. The residue (Rs. 50) was made repayable with compound interest at Re. 1-8 per cent. per mensem, and it was provided that the mortgage should not be redeemed until the Rs. 50 with interest should be paid off.

The Subordinate Judge, First Class, found that the mortgage-debt had been paid off out of the profits of the land, and decreed redemption on the plaintiff repaying by instalments the Rs. 50 with interest, which, the rule of *dámdupat* being applied, amounted to Rs. 50 more, or Rs. 100 in all.

The plaintiff applied to the Special Judge to review the case on the ground that he had repaid the Rs. 50. The Special Judge

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did not review the case on the ground applied for by the plaintiff, but acting, we presume, under the power conferred upon him by sections 53 and 54 of the Dekkhan Agriculturists' Relief Act, varied the decree by directing that the plaintiff should be at liberty to redeem on payment of Rs. 50 only, deeming that, as the mortgagee had been long since repaid the Rs. 100 out of profits, the balance of such profits should be applied to payment of the interest due on the Rs. 50. This he considered to be an equitable order.

Mr. Chaubal contends that this is, in effect, an order directing the defendant to refund the profits which he has received in accordance with the terms of his mortgage and so is contrary to the ruling in *Janoji* v. *Janoji*[1]. He also contended that the Special Judge had no jurisdiction under the circumstances to make a new case for the plaintiff different from that which he set forth in his application for review, citing *Gorakh Babaji* v. *Vithal*[2].

As to the latter objection we think that the Special Judge had jurisdiction *proprio motu* to vary the decree under the provisions of section 53, and the authority quoted does not, therefore, apply to the present case. As to the former, we think that the Courts while under section 12 inquiring into the merits of the case had authority under section 13 to treat the original advance of Rs. 100 and Rs. 50 as a single transaction and to set aside the agreement of the parties to treat part of the loan as a mortgage loan and part as an unsecured loan and to deal with the whole sum (as in substance it was) as an advance on mortgage. The arrangement to deal with the Rs. 50 as an unsecured debt, but to make the mortgage irredeemable until it was paid in effect, though not in law, made the property a security for the Rs. 50 —*Yashwant Shenvi* v. *Vithoba Shet*[3]; *Sundar Malhar* v. *Bapuji Shridhar*[4]. If such a device were allowed to prevail, it would be adopted in many cases, and the provisions of the Dekkhan Agriculturists' Relief Act would be defeated. The mortgagee has himself interlaced the two loans and cannot complain of their being treated substantially as one. Though the Special

(1) I. L. R., 7 Bom., 185.
(2) I. L. R., 11 Bom., 435.
(3) I. L. R., 12 Bom., 230.
(4) I. L. R., 18 Bom., 755.

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Judge has not dealt with the case exactly on the footing upon which we have considered it, we think that we ought not on that ground to exercise our extraordinary powers. Rule discharged with costs.

Rule discharged.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IMPERATRIX *v.* VANMALI AND OTHERS.*

1896. *October* 31.

Easement—Entry on land in order to repair—Dominant and servient owners, rights and liabilities of—Indian Easement Act (V of 1882), Sec. 24, Ill. (a)—Right of entry—Indian Railway Act (IX of 1890), Sec. 122.

The Rajnagar Spinning, Weaving and Manufacturing Company had a mill on one side of the B. B. & C. I. Railway line and a ginning factory on the other. To bring water from the mill to the factory a pipe had been laid beneath the railway line, and brick reservoirs built at each side to preserve the proper level of the water. Servants of the company having entered on the railway premises to repair the pipe and reservoirs without having first obtained the permission of the Railway Company, were convicted by a Magistrate under section 122 of the Indian Railway Act (IX of 1890) of an unlawful entry upon a railway. It was proved that the repairs were necessary.

Held, reversing the convictions and sentences, that, as the pipes and reservoirs belonged to the Spinning and Weaving Company and were kept in repair by them, they, as owners of the dominant tenement, had a right to enter on the premises of the Railway Company, the owners of the servient tenement, to effect any necessary repairs, and that the entry in question, being in the exercise of that right, could not be called unlawful.

APPLICATION under the Revisional Jurisdiction of the High Court under section 435 of the Code of Criminal Procedure (Act X of 1882).

The Rajnagar Spinning, Weaving and Manufacturing Company, Limited, at Ahmedabad had a spinning and weaving mill on one side of the B. B. & C. I. Railway and a ginning factory on the other, the railway line passing between the two.

The plots on which the mill, the factory and the railway line were situate formed originally one piece of ground owned by one

* Criminal Application for Revision, No. 210 of 1896.