APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

HARI LAHU PATÍL (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMJI VALAD PANDU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1904. *February* 11.

Transfer of Property Act (IV of 1882), sections 58, 60 and 86—Contract Act (IX of 1872), section 16—Mortgage—Sawaikhichadi—Interest on instalment in default—Mortgage enforceable in its entirety—Each case to be decided by its own circumstances.

A mortgage deed, both the parties to which were money-lenders, purported to be a security for Rs. 5,000 as principal and Rs. 1,250 *sawai*, repayable by 72 instalments. The *sawai*, which equalled one-fourth of Rs. 5,000, was to take the place of interest. The sum of Rs. 5,000 was made up as follows:—Rs. 4,812-8 were paid to the mortgagor in cash, Rs. 87-8 were retained by the mortgagee on account of the first instalment and Rs. 100 were retained on account of *khichadi* (bonus). The mortgagee having brought a suit to recover the mortgage-debt, namely, Rs. 7,995, and a question having arisen whether the mortgage was so unconscionable as to be unenforceable in its integrity,

Held, that under the circumstances of the case, the mortgage was enforceable in its integrity.

PER CURIAM:—The principles of justice, equity and good conscience do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard and unfair bargain on the borrower, but when that is not established against the mortgagee then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagor's while to pay in order to get a smaller advance when he was in want of money.

Each case must be determined according to its own circumstances.

Held, further, that there was nothing illegal in the provision for the payment of *sawai*.

PER CURIAM:—The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentitling circumstances allowed.

APPEAL from the decision of H. S. Phadnis, Assistant Judge of Dhulia, in Original Suit No. 240 of 1902.

The plaintiff sued to recover Rs. 7,995-0-0 (Rs. 4,637-8-0 principal and Rs. 3,357-8-0 interest) and interest from date of suit at 2 per cent. per month and costs by sale of property mortgaged by

* Appeal No. 61 of 1903.

1904.

HARI v. RAMJI.

one Pandu, the deceased father of defendants 1—5 on the 17th September, 1895. The following is the material portion of the mortgage-deed sued on :—

I (Pandu) borrowed a debt from your shop and gave you in writing an instalment (bond) for Rs. 5,000 principal together with *sawai* (25 per cent.) namely, Rs. 1,250, in all Rs. 6,250, including the *sawai*. The said amount will be repaid by 71 instalments of Rs. 87-8 each per month from this day and by the last, that is, the 72nd instalment of Rs. 37-8. Thus the whole amount of all the instalments will be paid off. In default of payment of instalments month after month as per this agreement, I will pay interest at 2 per cent. per month on the amount of the unpaid instalment. I will not raise any objection to the payment of the instalment with interest and will continue to pay interest (on the instalment) till the instalment is paid off. * * * * *

Rs. 187-8-0	Rs. 87-8 on account of the first instalment (due) this day and Rs. 100 on account of *khichadi* (bonus), in all Rs. 187-8, allowed deduction for.
„ 4,812-8-0	Paid (by you) in cash this day and received by me.
Rs. 5,000-0-0	

Defendant 6 was made a party because he was a subsequent mortgagee of a part of the property in suit, and defendant 7 was joined because he was a subsequent purchaser of a part of the property.

Defendants 1—5 admitted the execution of the mortgage-deed and contended that they received only Rs. 4,287-8 as plaintiff did not pay them Rs. 525 and deducted Rs. 100 as *khichadi* (bonus) and Rs. 87-8 as the first instalment; that they did not admit the *sawai* of Rs. 5,000; that in addition to the *sawai* interest at 24 per cent. on the instalments was unjust and exorbitant; that they paid to the plaintiff Rs. 800 on the 13th September, 1896, and Rs. 600 on the 26th March, 1899; that by the acceptance of the said payment of Rs. 1,400 the plaintiff had waived his right to claim the whole amount at once and it was so agreed at those payments, and that they were willing to pay the balance that would be properly found to be due to plaintiff by instalments of Rs. 500 each.

Defendant 6 pleaded that as he had no knowledge of the plaintiff's mortgage when he took his own mortgage, there should be marshalling and the fields mortgaged to him should be put to sale after the other property was sold to make up the deficiency, if any.

Defendant 7 was absent.

The Subordinate Judge found that defendants 1—5 had received Rs. 525; that the plaintiff was not legally justified in deducting Rs. 100 as *khichadi* and he was not entitled to interest thereon and on Rs 87-8 the amount of the first instalment; that the plaintiff was not legally justified in increasing the nominal amount of the principal in pursuance of the alleged rule of *sawai*; that the plaintiff had not waived his right to demand the whole amount at once; that the rate of interest was exorbitant and it should be reduced to 9 per cent., and that the plaintiff's mortgage was valid and binding as against defendants 6 and 7. On these findings the Subordinate Judge passed the following decretal order:—

Plaintiff included *sawai* and *khichadi* in the suit under the *bonâ fide* belief that he was entitled thereto, so I award him full costs.

Rs. 5,293 9-8 with interest thereon at 9 per cent. per annum from date of suit until payment and full costs to be recovered by sale of the mortgaged properties agreeably to the provisions of the Transfer of Property Act, section 88. In the sale, properties, except those mortgaged to defendant 6, should be put to auction first, and deficiency only, if any, to be recovered by the sale of the excepted properties; if any excess in the latter sale it should go to defendant 6 to the extent of his mortgage claim, and the nett balance in either sales should go to defendants 1—5. Defendants to bear their respective costs.

The plaintiff having appealed,

M. B. Chaubal appeared for the appellant (plaintiff).

P. P. Khare appeared for the respondents (defendants).

JENKINS, C. J.:—The question before us is whether a mortgage obtained by the plaintiff is so unconscionable as to be unenforceable in its integrity.

The document is dated the 17th September, 1895, and purports to be a security for Rs. 5,000 as principal and Rs. 1,250 as *sawai*, repayable in 72 instalments, the last being of Rs. 87-8-0, and those that precede it of Rs. 87-8-0.

The sum of Rs. 5,000 was made up as follows: Rs. 4,812-8-0 was paid in cash, Rs. 87-8-0 was retained on account of the first instalment and Rs. 100 was retained on account of *khichadi*. The *sawai* is said to take the place of interest and is one-fourth of the Rs. 5,000.

1904.

HARI v. RAMJI.

The bond further provides that on any instalment in arrear, interest shall run at the rate of 24 per cent. per annum. It is objected that the mortgage should not be enforced so far as it provides for *khichadi, sawai,* and interest on instalments in arrear, and this view has been adopted by the Assistant Judge from whose decree the present appeal is preferred.

A mortgagor's right to redeem is defined by section 60 of the Transfer of Property Act, which provides that at any time after the principal money has become payable, the mortgagor has a right on payment of the mortgage money to redeem. The mortgage money is the principal money and interest of which payment is secured for the time being (see section 58).

In the same way a mortgagee, who is foreclosing, is entitled to an account of what will be due to him for principal and interest on the mortgage (section 86). A mortgage, we are told by section 58, is a transfer "for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

How far then is the mortgagee in this suit seeking a remedy beyond that which the Transfer of Property Act sanctions, or asserting a claim at variance with the mortgagor's right of redemption?

To answer this question we must examine the several items to which objection is taken, and, as far as possible, determine their exact nature.

Now *khichadi* in this case refers to a sum which forms part of the principal amount expressed to be secured by the mortgage; it is not however paid to the mortgagor; it is retained by the mortgagee. For what purpose it is retained is not clear, but it is certain that it is of no direct benefit to the mortgagor.

Therefore it cannot be regarded as a loan or part of a loan in the strict sense of the term, unless recourse be had to the fiction to which Chitty, L. J., alludes in *Biggs* v. *Hoddinott*.[1] But the sums that can be secured by a mortgage are not limited to those which are advanced by way of loan (see section 58 of the

(1) (1898) 2 Ch. 307 at p. 322.

Transfer of Property Act) and there is nothing in the words of the Act, which forbids a mortgage being a security for more than is actually advanced. Still in ordinary cases the Courts in the absence of distinct agreement will allow a mortgage to stand only for the amount advanced: *Potter* v. *Edwards*.[1]

The legal position in somewhat similar circumstances has thus been described by Lord Hatherley in *Wallingford* v. *Mutual Society*[2]: "The basis of the whole transaction, of course, is contract, and in this particular case we have before us a sum of £6,000 in money or money's worth advanced on a given day, and the contract is that at a distant day a much larger sum, exceeding, in fact, or nearly amounting to double the original sum, is to be paid by quarterly instalments, of which there are to be eighty. That contract is not only contained in the deed, but it is contained in the rules of the society, under which that mortgage deed is made as a security for the performance of those rules. There is nothing to prevent that contract being carried out to the full extent, especially now that the Usury Laws are at an end, and no question can possibly, as it seems to me, arise upon a deed framed as this is, as to whether or not it is a case of penalty or contract. The sum is plainly secured by a contract and that contract must be observed."

Here we have a clear and unambiguous contract to repay a sum which includes the Rs. 100 retained as *khichadi*: how is the defendant to escape from the liability expressed in the document? The common ground of defence in such a case is that the transaction is unconscionable.

Turning to the Contract Act, as we are entitled (see section 4 of the Transfer of Property Act), we find that section 16 as amended by Act VI of 1899 provides:

"(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

"(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(1) (1857) 26 L. J. (Ch.) 468. (2) (1880) 5 App. Cas. 685 at p. 702.

1904.

HARI v. RAMJI.

"(*a*) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

"(*b*) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

"(3) Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

But the facts of this case forbid the application of this section. The mortgagor like the mortgagee was a money lender; it cannot be suggested that he did not thoroughly understand the transaction; it is even conceded before us that he himself makes advances on similar terms; and the evidence excludes the idea that the mortgagee was in a position to dominate his will. If it be argued that section 16 is not exhaustive, and that it does not displace the principles of justice, equity and good conscience, then accepting, but without admitting, this argument as correct, we still think the defendant's position is no stronger.

There is in the evidence no proof of fraud, oppression or unfair dealing, nor is there in the relation of the parties anything to support even a suspicion that the mortgagor was overreached.

The principles of justice, equity, and good conscience, as measured by the equitable doctrines which obtain in the English Courts, do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard and unfair bargain on the borrower, but when that is not established against the mortgagee, then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagor's while to pay in order to get a smaller advance when he was in want of money: *Marquess of Northampton* v. *Pollock*.[1]

Therefore we are of opinion that in the circumstances of this case objection cannot be successfully taken to the inclusion of this sum of Rs. 100 in the mortgage money.

(1) (1890) 45 Ch. D. 190 at p. 212.

Then how do matters stand in regard to the *sawai* of Rs. 1,250. It is a sum payable by way of, or perhaps it would be more correct to say in place of, interest, and is repayable with the principal in the stipulated instalments.

We can see nothing illegal in a provision for payment of that sum (see *Wallingford* v. *The Mutual Society* (1)) while for the reasons we have already given, the bargain cannot be attacked as unconscionable.

It only now remains to consider the exception taken to the provision that interest shall run on an instalment in default.

Now each instalment is made up in part of principal and in part of *sawai* and so far as it consists of principal, we fail to see what objection there can be to its bearing interest if not paid on its due date: if it does not run, then the creditor is kept out of his principal without the compensation of interest.

Let us now consider the effect of the provision so far as it relates to *sawai*: if *sawai* be regarded as interest (and that, as the view most favourable to the respondents' contention, we will assume to be its character) the result of the stipulation is to make interest run on interest. The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentitling circumstances allowed: *Ganga Pershad Sahu* v. *The Land Mortgage Bank*.(2) The rate, 24 per cent. might in ordinary circumstances be regarded as high, but, as between parties situated as those before us are, it is important to bear in mind that it is the rate commonly charged in the locality, and on the facts of this case we see no reason for treating the provision for its payment as a penalty.

Before parting with the case there is one remark we would desire to make, lest any one should be misled by the opinion we have expressed. It was stated before us that the appellant was desirous of obtaining from this Court a decision as to the validity of mortgages of this class which are said to be common in the district from which this case comes.

Though our decision is in the appellant's favour, it is based wholly on the special facts of this case. We have come to the

(1) (1880) 5 App. Cas. pp. 702, 710. (2) (1893) 21 Cal. 366.

1904.

HARI v. RAMJI.

conclusion that as between this mortgagor and this mortgagee, money-lenders on both sides, there was no room for the protection afforded to the victims of unconscionable bargains. Had the mortgagor been an agriculturist (we merely take that as a typical case) the result might and probably would have been different, and it is instructive to note in this connection the 3rd illustration to the 16th section of the Contract Act as amended. In this respect each case must be determined according to its own circumstances.

The decree of the lower Court must, therefore, be varied by substituting Rs. 7,995 for Rs. 5,298-9-8, and it should be expressed in full not merely by reference to section 88 of the Transfer of Property Act. The appellant must get his costs of this appeal.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1904. *February* 16.

BHAGWANTAPPA BIN LUNGAPPA (OPPONENT), APPELLANT, *v.* VISHWANATH AND ANOTHER (APPLICANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 225, 228, 244, 588—Decree—Execution—Decree passed without jurisdiction—Jurisdiction—Appeal—Practice.

When a decree passed by one Court is sent for execution to another the latter Court is entitled to go into the question whether the first Court had jurisdiction to pass the decree: and if that Court declines to become the executing Court the order so passed is not an order either under section 244 or section 588 of the Civil Procedure Code, and cannot be appealed against.

APPEAL from the decision of E. H. Leggatt, District Judge of Kánara, reversing the decree passed by G. N. Kelkar, Subordinate Judge of Sirsi.

The applicant obtained a mortgage decree against the opponent in the Court of the Subordinate Judge of Kumta in Suit No. 285 of 1894. The property mortgaged was situated within the local limits of jurisdiction of the Subordinate Judge's Court at Sirsi, and the decree directed sale of that property.

* Second Appeal No. 685 of 1903.