

1878  
 IN THE  
 MATTER OF  
 THE  
 PETITION OF  
 SHIBO PRASAD  
 PANDAH.

that the Magistrate would have acted more properly had he refused to take the petition which has given rise to the present proceedings.

I therefore agree in setting aside the conviction and sentence.

*Conviction set aside.*

## APPELLATE CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell,*

1878  
 May 16.

PROTAP CHUNDER DASS (PLAINTIFF) v. GOUR CHUNDER ROY  
 (ONE OF THE DEFENDANTS).\*

*Principal and Surety—Giving Time—Interest paid in Advance—Discharge of Surety.*

The acceptance of interest in advance by a creditor as a general rule operates as a giving of time to the principal debtor, and consequently as a discharge to the surety, unless the surety knows of, and consents to, the advance. The question as to whether an advance of interest operates as a giving of time to the principal debtor is a mixed question of law and fact.

THIS was a suit to recover the sum of Rs. 20,740 due on certain hundis, together with interest. The plaint stated that the hundis in question were drawn by the second defendant, Nicholas Peter Pogose, on the 17th of September 1875, payable ninety days after date, in favor of the third defendant Bhubun Mohun Dass, and that they were accepted by the first defendant Gour Chunder Roy. The hundis were sold to the plaintiff by Bhubun Mohun Dass. It was admitted that the defendants Gour Chunder Roy and Bhubun Mohun Dass were merely sureties for Nicholas Peter Pogose. The defendants Gour Chunder Roy and Bhubun Mohun Dass contended that they were discharged from their suretyship by reason of the plaintiff giving time to the defendant Nicholas Peter Pogose, after the hundis became due, by receiving interest in advance from him.

\* Regular Appeal, No. 5 of 1877, against the decree of Baboo Gunga Churn Sircar Roy Bahadoor, Subordinate Judge of Zilla Dacca, dated the 14th of September 1876.

The *Advocate-General* (The Hon'ble *G. C. Paul*, with him  
Mr. *Evans* and Baboo *Nullit Chunder Sen*) for the appellant.

Mr. *Branson*, Baboo *Bhubun Mohun Dass*, and Baboo *Lall Mohun Das* for the respondents.

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The judgment of the Court, so far as is material, was as follows:—

GARTH, C. J. (MCDONELL, J., concurring):—This is a suit brought by the plaintiff Protab Chunder Dass to recover from the defendants the sum of Rs. 20,740 for principal and interest due upon two hundis, each dated the 17th of September 1875, payable ninety days after date, drawn by Mr. Pogose, the second defendant, in favor of the third defendant, and accepted by Gour Chunder Roy, the first defendant.

The lower Court has held that the last-named defendant is not liable, and the only question in this appeal is whether he is liable or not.

It is an admitted fact in the case, that the only person for whose benefit these hundis were drawn and negotiated is the drawer, the second defendant, and that the other defendants were his sureties; and the defence which is set up by Gour Chunder is, that, after the bills became due, the plaintiff gave time to Mr. Pogose, the principal debtor, without his (the defendant's) consent, by accepting from him a sum of Rs. 1,860 by way of interest in advance, and that this discharged the first defendant from liability.

There is no doubt as to the fact of these advances for interest having been received; and the questions which we have to decide are—

1st.—Whether the effect of those advances was to give time to the principal debtor; and

2ndly.—Whether the defendant No. 1 was aware of, and consented to, those advances.

(I) The first of these, having regard to the authorities upon the subject, appears to be a mixed question of law and fact. It has been held, both here and in England, that, under certain circumstances, the receipt of advance interest by the credi-

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tor does not create a binding contract by him with the principal debtor not to sue him during the time for which the advance interest is paid. [See the cases of *Punchann Ghose v. Daly* (1), and *Dwarkanath Mitter v. Daly* (2), decided by Phear, J., in this Court, and the case of *Rayner v. Fussey* (3).]

But a long current of authorities in England (which will be found collected in the notes to *Rees v. Berrington* (4), and the case of *Kali Prasanna Roy v. Ambica Charan Bose* (5), decided in this Court by Couch, C. J., and Markby, J., in which all the leading authorities are reviewed) clearly show that, as a general rule, the acceptance of interest in advance by the creditor does operate as a giving of time to the principal debtor, and consequently as a discharge to the surety.

In this case we think it clear that the arrangement with regard to batta, or advance interest, operated to prevent the plaintiff from suing Mr. Pogose during the time for which the advance was made.

The witness Monohur Shah, who made the arrangement, and who is called by the first defendant, distinctly says that his avowed and express object in paying the advance interest was to obtain further time for payment of the bills till Mr. Pogose returned to Dacca. The only object and consideration on Mr. Pogose's part was to stay the plaintiff from taking proceedings; and if proceedings had been taken in the teeth of that arrangement, any Court ought, undoubtedly, to have restrained the plaintiff from prosecuting his suit.

That being so, the legal position of the first defendant was undoubtedly changed. He had a right, at any time after the hundis became due, to insist upon proceedings being at once taken against Mr. Pogose, and any binding arrangement between the plaintiff and Mr. Pogose, which prevented the former from suing the latter, deprived the defendant No. 1 of that right.

The taking of advance interest did therefore discharge the first defendant, unless he consented to the transaction.

(1) 15 B. L. R., 331.

(3) 28 L. J., Exch., 132.

(2) *Id.*, 338 note.

(4) 2 Wh. &amp; T. L. C. (5th edn.), 992.

(5) 9 B. L. R., 261; S. C., 18 W. R., 416.

(II) This brings us to the second, and, as we consider, the only real question in the case, *viz.*, did the defendant No. 1 know of, and consent to, the advance interest being taken?

This point has been fully argued on both sides; and having carefully considered the evidence, we are of opinion that he did consent to it.

*Appeal allowed.*

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ROY.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Jackson.*

BONOMALI BAJADUR (ONE OF THE DEFENDANTS) v. KOYLASH  
CHUNDER MOJOOMDAR AND OTHERS (PLAINTIFFS).\*

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June 19.

*Landlord and Tenant—Kurpha Tenants—Rights to Transfer—Execution.*

The jummai rights of a kurpha (1) under-tenant are not transferable without the consent of the ryot landlord.

THE facts of this case sufficiently appear in the judgments of the High Court.

Mr. *H. C. Mendies* for the appellants.

Baboo *Jogesh Chunder Dey* for the respondents.

GARTH, C. J.—We think that there has been a mistake pervading the lower Courts in this case.

The question arose in this way: The plaintiff, an execution-creditor, attached certain lands held by his execution-debtors. The present defendant, who is the occupancy ryot of those lands, objected to their being sold, inasmuch as the execution-debtors were his *kurpha* tenants, and that their interest in the land was not saleable without his (the occupancy ryot's) consent.

This objection prevailed; whereupon this suit was brought by the plaintiff against the occupancy ryot and the execution-debtors to establish his right to sell the judgment-debtor's interest.

\* Appeal, under s. 15 of Letters Patent, against the decree of Mr. Justice McDonell, dated the 15th of March 1878, made in Special Appeal No. 2682 of 1876.

(1) Is an under-tenant of a ryot, also usually cultivate on the terms of paying called *chikani* in Rungpore, and *prajai* half produce.—*Whinfield's Law of* (from *praja*), and generally *shikmi* or *Landlord and Tenant*, p. 17. *petao* ryot. These under-tenants