

PRIVY COUNCIL.

CASSIM AHMED JEW A

v.

NARAINAN CHETTY.

P.C.*
1910

March 8, 9.

[On appeal from the Chief Court of Lower Burma, at Rangoon.]

Privy Council, practice of—Dismissal of appeal with costs—Alteration of decree appealed from in respondents' favour without cross-appeal by them.

In a suit on a promissory note for Rs. 16,042 principal, and interest at $1\frac{1}{2}$ per cent per mensem, and also for interest "on the decree from the date of the institution of the suit until realisation," the first Court passed a decree for only Rs. 500 "with interest as prayed." The Chief Court of Lower Burma ordered that "the decree of the Original Court be altered to a decree for the full amount claimed," and said nothing about interest. The plaintiffs (respondents) applied by petition to the Chief Court to amend its decree by adding a specific statement that "interest as prayed for in the plaint" was payable on the decretal amount, but the application was dismissed. The defendant appealed to the Privy Council, and shortly before the case came on for hearing, the respondents petitioned for special leave to enter a cross-appeal so far as the decree of the Chief Court had failed to include interest after the institution of the suit. A consent order in Council was made on 5th March 1910 that the respondents should have leave on the hearing to appeal on the question raised in their petition, and their Lordships, while dismissing the appeal, altered the decree of the Chief Court as prayed in the petition without a cross-appeal being entered.

APPEAL from a decree (21st May 1906) of the Chief Court of Lower Burma, at Rangoon, on its Appellate Side, which varied a decree (30th June 1905) of the same Court on its Original Side.

The second defendant obtained leave to appeal to His Majesty in Council.

The suit out of which this appeal arose was brought by the respondents against the appellant and his brother, Hashim Ahmed Jewa, as makers of a promissory note payable on demand for Rs. 15,000 with interest at $1\frac{1}{2}$ per cent. per mensem,

* *Present*: LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON and MR. AMEER ALI.

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which had been given on 22nd January 1904 in consideration of a loan to Hashim Ahmed Jewa, the first defendant in the suit, in which it was sought to recover principal and interest amounting in all to Rs. 16,042-8. The plaint also prayed for interest on the principal from the date of the institution of the suit until decree, and on the amount decreed until realisation.

The suit was brought on 19th August 1904, shortly before which date the first defendant had been adjudicated an insolvent and had absconded : he did not appear to defend the suit.

The second defendant made various defences, but the main contest in the suit was as to whether certain sums amounting to Rs. 14,400 had been paid by Hashim Ahmed Jewa to the plaintiffs, and specifically appropriated by him towards satisfaction of the promissory note in suit.

The Original Court (BIGGE J.) found that issue in the defendant's favour and made a decree for only Rs. 500, with interest at 1½ per cent. per mensem from the date of the institution of the suit till realisation as prayed in the plaint, and also for costs on the sum decreed.

The Appellate Court (C. E. FOX, Offg. C.J., and HARTNOLL J.) on appeal by the plaintiffs ordered that "the decree of the Original Court be altered to a decree against both defendants for the full amount claimed." Nothing was said about interest.

The defendant petitioned the Chief Court for leave to appeal to the Privy Council, but the application was refused ; and special leave to appeal was granted by His Majesty in Council on 26th March 1907.

On 25th April 1907 the plaintiffs applied to the Chief Court by petition, stating that their decree had been transferred to the District Court of Amherst for execution, and that the Judge of that Court had refused to allow interest on the ground that it was not allowed by the Appellate Court's decree ; and submitting that, taken in conjunction with the decree in the Original Court, the judgment of the Chief Court amounted to an order that the sum of Rs. 500 in the original decree was to be altered into a sum of Rs. 16,042-8, and that there was nothing in the judgment of the Chief Court providing that the

provision in the original decree for payment of interest was to be reversed or set aside; and the plaintiffs prayed that under the provisions of section 206 of the Civil Procedure Code (1882) the Chief Court would amend its decree by setting out specifically that interest was payable on the decretal amount.

In dismissing that application the Chief Court said: "We do not think that the omission of mention of interest in the Appellate Court's judgment and decree can be regarded as a clerical error, or that the judgment necessarily implied that the decree would carry the contract rate of interest on the principal sum."

Shortly before the appeal came on for hearing, the respondents petitioned His Majesty in Council for special leave to enter a cross-appeal, so far as the Chief Court's decree failed to include interest after the institution of the suit. A consent order in Council was made on 5th March 1910 that the respondents should have leave on the hearing to appeal on the question as to interest subsequent to the institution of the suit raised in their petition. No cross-appeal was entered. The respondents in their case submitted that the appeal should be dismissed, and the decree of the Chief Court varied by allowing the respondents interest from the date of suit to decree, and from the date of the decree until payment.

Roskill, K.C., and J. W. McCarthy, for the appellant.

De Gruyther, K.C., and E. U. Eddis, for the respondents.

The judgment of their Lordships was delivered by

March 9.

LORD MACNAGHTEN. This is a pure question of fact. Their Lordships see no reason to disturb the judgment of the Court from which the appeal is brought.

It does not appear to their Lordships necessary to go into the affirmative case made by Mr. De Gruyther. It is enough to say that in their Lordships' opinion the judgment of the Chief Court of Lower Burma is right, and their Lordships agree with it for the reasons which they have given, and which it is not necessary for their Lordships to repeat.

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With reference to the two clerks, their evidence is not sufficient to support the defendants' case. The evidence is extremely weak. They say it is customary to endorse on a promissory note the payments made on account. There is no endorsement on the promissory note, and there is no corroboration of their statement, which is positively denied on the other side.

Their Lordships will, therefore, humbly advise His Majesty that the appeal must be dismissed. The appellant will pay the costs of the appeal.

The judgment of the Chief Court will be amended by the providing for interest subsequent to the decree in accordance with the prayer of the petition presented by the respondents.

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Appeal dismissed.

Solicitors for the appellant : *Bramall & White.*

Solicitors for the respondents : *Sanderson, Adkin, Lee & Eddis.*

LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
 and Mr. Justice Doss.*

BANESWAR MUKHERJI

v.

UMESH CHANDRA CHAKRABARTI.*

1910
 April 29.

Kabuliyat, construction of—Rent, partly in money and partly in kind—Fixed rent—Evidentiary value of later documents between different parties in construing an earlier one.

Where the terms of a document clearly point to the fact that the rent is to be partly in money and partly in kind, the rent cannot be regarded fixed in amount, even though the *kabuliyat* is a *mokarrari* one, and in the original deed the two items of rent in kind and rent in cash were lumped up and expressed as a consolidated money-rent.

An earlier document cannot be construed by reference to a later document which is not between the same parties.

* Letters Patent Appeal, No. 79 of 1909, in Appeal from Appellate Decree No. 1083 of 1908.