1867.

MAHIPATRAV CHANDRARA'V v. NENSUK A'NANDRA'V SHET MA'RVA'DI.

minor, or the minor's father, or the present administrator to the estate. This point must be elucidated before it can be decided whether the defendant can be allowed a set-off against the present claim.

We, therefore, reverse the decree of the Assistant Judge on the preliminary point, and remand the suit to the lower appellate court, for a new trial and decision on the merits, with advertence to the directions contained in this judgment. The costs of this special appeal to be borne by the defendant, the special respondent. The costs in both the lower courts to be apportioned at the final decision. We remark that it will be a proper case for the award of interest from the date of the institution of the suit till the date of payment, if ultimately any balance be decreed in favour of the plaintiff.

GIBBS, J., concurred.

Decree reversed, and suit remanded.

Dec. 12.

Special Appeal No. 179 *of* 1867.

VINA'YAK SADA'SHIV VOZE .....*Appellant.*
RA'GHI, widow of ALYA', HAS PA'TI'L bin ALYA', and KA'MLYA' bin ALYA'.....*Respondents.*

Lease—Agreement between Mortgagor and Mortgagee—Rent—Interest—Act XXVIII. of 1855.

The provision contained in Act XXVIII. of 1855 that any rate of interest which the parties may have agreed upon shall be awarded, in no way prevents a Civil Court in India, which administers both law and equity, from examining into the character of agreements made between persons, such as mortgagor and mortgagee, trustee and *cestui que trust*, between whom relations exist, enabling one party to take advantage of the other, and from declining to enforce such agreements when they are shown to be unfair and extortionate.

THIS was a special appeal from the decision of S. H. Phillpotts, Assistant Judge of the Konkan at Thána, in Appeal Suit No. 457 of 1866, confirming the decision of the Munsif of Panvel.

1867.

VINA'YAK S. VOZE v. RA'GHI *et al.*

The Appeal was heard before TUCKER and GIBBS, JJ.

The facts of the case sufficiently appear from the following judgment :—

TUCKER, J. :—This suit has been instituted by a mortgagee, subsequent to the redemption of the mortgage, to recover from the mortgagors the sum of Rs. 138-15-0, as the balance due on an agreement to pay a certain rent on the mortgaged land which was leased by the mortgagee to the mortgagors during the existence of the mortgage.

The defendants denied the execution of the agreement respecting rent, and pleaded that the claim was barred by the law of limitation.

The Munsif held that the plaintiff had received full satisfaction of the mortgage debt (principal and interest), and that he could not now recover any further sum on account of rent.

The Assistant Judge of Thánà confirmed this decree, on the ground that the rent fixed was extortionate, and that the plaintiff had received the full sum he was entitled to. He cited, in support of his decision, S. A. No. 530 of 1865, *Kedári bin Rápu* v. *Átmárámbhatbin Náráyanbhat* (*a*).

In special appeal it has been contended that the precedent relied on by the Assistant Judge was inapplicable; that by the deed of mortgage the plaintiff was entitled to the usufruct of the land in lieu of interest ; and that as the mortgagors afterwards took a lease of this land at a fixed rent from the mortgagee, they were bound to pay that rent, however high it might be ; that Act XXVIII. of 1855 required that a Civil Court should enforce the payment of any rate of interest which might have been agreed upon between the parties, and the court in this instance was bound to carry into effect this agreement for rent, which was in lieu of interest.

The facts of this case appear to be as follows :—In 1849 the plaintiff took certain fields in mortgage as security for a

(*a*) 3 Bom. H. C. Rep., A.C.J. 11.

1867.

VINAYAK S. VOZE v. RAGHU et al.

debt of Rs. 30, the produce of the land to be enjoyed by the mortgagee in lieu of interest; and on the same day the mortgagee let the lands to the mortgagors (a widow and her two sons), on their agreeing to pay him an annual rent of 1¼ *khandi* and 1 *man* of *bhát* (rice in the husk), and 300 bundles of straw. The rent was paid from 1849 to 1861, or for eleven years. Subsequently the mortgagee instituted a suit to foreclose the mortgage, and he obtained a decree in appeal on the 17th of March 1865, in which it was declared that the mortgage was to be foreclosed if the principal sum due, or Rs. 30, was not paid within a certain time after the passing of the said decree. From this decision no special appeal was made; and the mortgagors paid thirty rupees to the mortgagee and redeemed the field. The mortgagee now claims arrears of rent for three years, at the annual amount of grain fixed in the agreement, or from 1862 to 1864. The amount claimed as one year's rent is considerably in excess of the principal sum advanced, *i.e.*, thirty rupees; and the lower courts have both found that the plaintiff has already received in the shape of rent the equivalent of Rs. 600, or just twenty times the sum originally advanced by him.

We are of opinion that, as a Court of Equity, we are bound to examine into the nature of agreements entered into between persons who stand to each other in the relation of mortgagor and mortgagee, trustee and *cestui que trust*, and that if it should appear that such agreements have been obtained under any pressure, owing to the existence of this relation, they should not be given effect to.

"In order to render a contract or an agreement of any kind binding, there must be the assent of both parties to the agreement, under such circumstances as to show there was no pressure, no influence existing of a kind to make the assent an imperfect assent, or an assent which under other circumstances would have been refused. If the assent to the agreement is not an assent given under such circumstances as that both parties are on an equal footing, and the agreement one perfectly free from any influence or pressure in the eye of this court, it is not an assent sufficient to con-

stitute an agreement." These are the words used by STUART, V. C., in the case of *Barrett* v. *Hartley* (*b*); and they command our acquiescence, as do also the further observations of the same learned Judge in the same case that "one effect of the repeal of the usury laws was to bring into operation, to a greater extent than formerly, another branch of the jurisdiction of the English Equity Courts, namely, the principle which prevented any oppressive bargain, or any advantage exacted from a man under grievous necessity, from prevailing against him." It appears to us that the doctrine thus enunciated is sound, and that, though the Legislature has provided that any rate of interest which the parties may have agreed upon shall be awarded, yet this enactment in no way prevents a Civil Court in India, which administers both law and equity, from examining into the character of agreements made between persons between whom relations exist which will enable one party to take advantage of the other, and from declining to enforce such agreements unless they are shown to be fair and reasonable. When they are not so, it may be justly inferred that the assent of the person who has subscribed the extortionate agreement has been obtained through the pressure which the other party has been able to apply, in consequence of the position in which the one stood to the other. In the present case the parties are mortgagors and mortgagee, and the mortgage deed only stipulated that the mortgagee was to have the usufruct of the land in lieu of interest. The mortgagee afterwards, instead of using the land himself, let it to the mortgagors under an agreement that they were to pay an annual rent, which he admits by his present claim to have been far in excess of the principal sum which he advanced on the mortgage, and which he received for eleven years. Now, it cannot be supposed that the mortgagors would have agreed to pay such a rent if they had been entirely free agents; and we must hold that the agreement, if ever executed (for that has not been found proved), was obtained under the pressure which the plaintiff's position as a mortgagee enabled him to put upon the defendants. The

(*b*) 2 L. R. Eq. 795.

1867.
VINA'YAK S. VOZE v. RA'GHI et al.

grain rent, which was reserved, appears to us to have been extortionate and oppressive, and the agreement to be of a character which, considering the relation of the parties, cannot equitably be enforced. We, therefore, affirm the decree of the Assistant Judge with costs on special appellant.

GIBBS, J. :—I concur.

Decree affirmed.

Dec. 13.

Special Appeal No. 552 *of* 1866.

BHIMA'CHA'RYA bin VYANKATA'CHA'RYA ...*Appellant.*
FAKIRA'PPA' bin A'NANDA'PPA'.....*Respondent.*

Act VIII. of 1859, *Secs.* 41—111, *and* 119—*Pleader*—Ex parte *hearing.*

Held that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant but not instructed to answer, or instructed not to answer at all, was an "*ex parte*" hearing, and that no appeal lay from a judgment passed in such suit.

THIS was a special appeal from the decision of W. Sandwith, Joint Judge of the District of Dhárwár, reversing the decision of the Ṣadr Amín of Húbli.

The plaintiff sued to eject his tenant, the defendant, from a field, alleging that, though the lease had expired, the defendant would not give up possession.

The defendant, Fakírápá, duly appointed a vakíl, who, however, stated that he had received no instructions from his client with regard to the case, and that he was unable to put in any written statement, or make any defence.

The Ṣadr Amín, after several adjournments to enable the pleader of the defendant to get instructions, which were unsuccessful, at last proceeded with the trial of the case, and gave a decree in favour of the plaintiff.

In appeal, the Joint Judge considered that the defendant had not shown any valid reason for not instructing his pleader in the court of original jurisdiction; but still, being