

1869
 Rasaji Davlaji
 v.
 Sayana Sagdu
 et al.

intefere to relieve against (Story on Equity Jurisprudence Vol. II. secs. 1314 and 1316) ; and in *Seton v. Slade* (a) the Court of Chancery has held that a stipulation to pay interest at five per cent. on a mortgage with interest at four per cent., if the four per cent. be not regularly paid, is a penalty, and that the party may be relieved from it, on the terms of paying the four per cent, with interest thereon from the time when the same ought to have been paid, as if it had been received. (White and Tudor's Leading Cases in Equity, Vol. II., pp. 475 and 476, 3rd ed.) It is on this doctrine that that Court decrees the redemption of a mortgage, which, in default of payment at the stipulated time, would be foreclosed at law, and our Courts, which are Courts of Equity as well as of law, have in later years adopted that doctrine, and have awarded the re- conveyance of mortgaged property on payment of the mortgage debt with interest. I am, therefore, of opinion that the same doctrine should be made applicable to cases of the class now submitted, and that the defendants may be relieved from paying the increased rate of interest. ”

PER CURIAM (COUCH, C. J., and NEWTON, J.) The Court is of opinion that the increased rate of interest is a penalty, and may be relieved from on payment by the defendant of the lower rate.

Referred Case.

MOTJI bin RATNAJI.....Plaintiff.
 SHEKH HUSENDefendant.
Interest—Promissory Note—Penalty.

Jan. 19.

Where promissory note payable by instalments stipulated that, in default of payment of any one instalment, interest should run at one anna per rupee per mensem, this rate of interest was relieved from on payment of interest being made at 9 per cent. per annum from the time when each instalment became payable until the time of payment.

CASE referred for the decision of the High Court by Janardhan Vasudevji, Judge of the Court of Small Causes at Puna.

“The only difference between the two cases, (this and the one immediately preceding) is, that in the case already re-

(a) 7 Ves. 265.

ferred, the promissory note stipulates for an increased rate of interest on default of payment, while in that now under notice, the promissory note, after stipulating for payment by monthly instalments without interest, provides for interest at one anna per Rupee per mensem, in default of payment of any one instalment. The plaintiff in this latter suit, it is to be observed, admits in his evidence, that the amount for which the note has been taken, includes interest added on in advance for the period to which the instalments extend.

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“The object of the two agreements being the same ; viz., to secure payment at the stipulated time, the agreement in the one case partakes as much of the character of a penalty, as the agreement in the other ; I am, therefore, of opinion that the agreement in the present case also should be relieved against.

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The Court is of opinion that the increased rate of interest is a penalty, and may be relieved from on payment of interest, at the rate of 9 per cent., from the time when each instalment became due to the time of payment.

Special Appeal No. 536 of 1868.

Dada valad Valli Appellant.

Jan. 20.

Bavasha valad Kasam Respondent.

*Mortgage—Redemption—Denial of mortgage by mortgagee—
Vakil's omission to argue point.*

Where a mortgagor brings a suit to redeem mortgaged land on payment of such sum as shall be found due to the mortgagee, the Court is not justified in decreasing possession *without payment* in favour of the mortgagor, merely because the mortgagee denies the existence of the mortgage.

Where a point is taken on appeal the Appellate Court should consider and decide it, although the *vakil* may omit to argue it.

This was a Special Appeal from the decision of A. C. Watt, Acting Assistant Judge of Sattara, in Appeal suit No. 123 of 1868, confirming the decree of the Munsif of Maini.