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.

"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.

Jan. 20.

Dada valad Valli ... ... *Appellant.*

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 indecreeing possesion *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.

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Bavasha valad Kasam sued to redeem, on payment of the amount which might be found due, certain land alleged to have been mortgaged to the defendant, in the Fasli year 1258 (A.D. 1848-49), and given into his possession.

The defendant denied the mortgage, and stated that his father had taken up the land from the village authorities, and that he succeeded his father in the *Vahivat*, and that his and the plaintiff's father had been divided for 60 or 70 years.

The Munsif, Bhaskar Bhikaji, found that, when the fathers of the parties were united in interest, they got the land from an *inamdar*; that, in the Fasli year 1237 (A. D. 1827-28), the land in question fell to the plaintiff's share at a division of the property, and that the plaintiff proved that his mother had mortgaged the land to the defendant for Rs. 80, but the Munsif held that, as the defendant had utterly denied the mortgage, he was not entitled to get the money due upon the mortgage, and, therefore, he awarded possession of the land to the plaintiff without payment of the mortgage money. He relied in support of his ruling on *Shek Abdulla* v. *Shek Muhamad* (*a*).

The following is the judgment of the Acting Assistant Judge :—

"The issues are :—(1) Did the plaintiff mortgage the land to the defendant. (2) If so, has the defendant a right to get his mortgage money.

"On the first issue I find that plaintiff's mother did mortgage the land, as is proved by the defendant's own witness No. 41, the Patil, as also by witnesses Nos. 30 and 25. What appellant states in the appeal, as to the non-details of the mortgaging, is quite unreasonable and absurd. In cases of mortgages in this country, the practice generally is for the deed to remain with the mortgagee, and, if he, as in this case, declines to produce it or show it to plaintiff, how can the plaintiff know the details, such as date, amount, &c. In this case it could not be so, because the plaintiff was

(*a*) I. Bom. H. C. Rep. 177.

not the actual mortgagor, apparently, but his mother. Plaintiff's plaint is indefinite, it is true, but it is just as definite as is consistent with truth in a case of this kind. A further corroboration of the mortgaging is the proved fact that plaintiff and defendant are relatives, and so they, at one time, and as the Munsif finds now, had shares in the land. No. 41 proves this in detail, and he is the witness of all others who should know, he being the Patil. No. 25, the writer of the mortgage, which is not produced, is also the natural writer, he being village Kulkarni.

"Appellant has not said a word on the second point.

"I confirm the Munsif's decision with costs on appellant."

Pandurang Balibhadra for the respondent. The appellate Court was justified in the conclusion at which it arrived, by reason of the denial by the mortgagee of the mortgage. The point, however, was abandoned, as appears from the Assistant Judge's observation that "the appellant has not said a word on the second point."

Couch, C. J. :—In this case the plaintiff by his plaint sought to redeem the land on payment of the money that might be found due on the mortgage, and he by his own witnesses proved the amount of the mortgage. The defendant, however, denied the mortgage, and the Munsif, although the plaintiff had made out the case put forward by him, awarded to him that which was not asked for by him, viz., possession of the land free from any payment. The decision of the High Court which is quoted does not apply to this case, and without expressing any opinion as to whether we concur in it, it is sufficient for us to remark that there it was for the mortgagee to prove the amount of the mortgage and he fraudulently destroyed the deed. But here we see no ground for holding that, because the defendant denied the case set up by the plaintiff, the latter should get more than he asked for. The second issue raised in appeal was whether the defendant had a right to get his mortgage money, but the Assistant Judge did not go into it

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on the ground that the appellant's *vakil* had not said a word on it; but remembering the mode in which cases are conducted in the Mofussil, we are of opinion that, if a point really arises and is taken, we should not be justified in holding that it was abandoned, because the *vakil* did not argue it. The decree in this case should have been for redemption of the land on payment of the mortgage money, which is found to be Rs. 80: and we therefore amend the Assistant Judge's decree accordingly. The party seeking redemption must generally pay the costs of the suit; but here the plaintiff offered payment of the amount which might be found due, and the defendant denied the mortgage in toto. He should, therefore, be made liable for the costs in the lower Courts. The defendant had to come to this Court to get the error of the lower Court corrected, and, therefore, he should have the costs of this Special Appeal.

Newton J. concurred.

Decree amended.

Special Appeal 419 of 1868

Jan. 26.

Ramchandra Raghunath.....*Appellant.*

Abaji bin Rastya.....*Respondent.*

Jurisdiction—Small Cause Court—Arrears of rent, suit for—Special Appeal—Act XI. of 1865, sec. 6 —Act XXIII. of 1861, sec. 27.

In suits for arrears of rents of land, when the claim is under Rs. 500, a Special Appeal lies to the High Court, such claims not being generally cognizable by Courts of Small causes.

For the purpose of recovering rent from a tenant the *mrugsal* year ends on the 31st of July.

This was a Special Appeal from the decision of A. Bosanquet, Acting Judge at Thana, in Appeal suit No. 296 of 1867, reversing the decree of the Munsif of Panwell.

The plaintiff, Ramchandra, sued the defendant, Abaji, to recover rent of a portion of a *khar*, alleging that he had leased it to the defendant under an agreement that the latter should pay him six *mans* of rice per *bigha* in the