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mortgage for payment, as the period of limitation for suits to redeem under such circumstances as those mentioned in the question put to us.

On principle then, as well as upon authority, we hold ourselves bound to answer the question referred to this full bench, "whether redemption is barred by a mortgagee's possession for the period of twelve years after the date on which, according to the terms of the mortgage deed, the mortgage is to be converted into a sale," in the negative.

We remit this cause (with the above answer) to the Second Division Bench for disposal.

NOTE.—On the same day a similar answer was given to the same question in Special Appeal Nos. 86 of 1871 and 107 of 1871 referred to a full bench.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 458 of 1869.

May 23

NA'RA'YAN and others..... *Appellants.*

SATVA'JI and others ..... *Respondents.*

Hindu law—Mortgage—Interest exceeding principal—Dámdupat—*Reg. V. of* 1827 *section* 12.

According to the Hindu law of *dámdupat* interest exceeding the principal sum lent cannot be recovered at any one time.

Cases bearing upon the subject of *dámdupat*, and how far and when that law is applicable to loans upon mortgage reviewed and considered.

THIS was a Special Appeal from the judgment of the Joint Judge at Puna.

The facts sufficiently appear from the judgment of the Court.

The Special Appeal was argued before WESTROPP, C.J. and WEST, J.

Ganpatráv Bháskar, for the appellants.

Shántárám Náráyan, for the respondents.

Cur. adv. vult.

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WESTROPP C.J.:—This is a suit for redemption of two fields mortgaged by the plaintiff's father to the deceased defendant.

The first mortgage was dated 7th July 1834. It was for Rs. 401 Chándvad currency. The important parts of it shall be hereafter stated.

The second mortgage (exhibit No. 7) was dated 21st November 1834, and was for Rs. 425 of the same currency repayable in one year from date. The interest reserved was Rs. 2 per cent. per mensem. This mortgage was, by way of further charge, of the same land and refers to the previous mortgage. The mortgagors also personally undertook to pay the principal and interest.

The third bond (exhibit No. 8) was dated 12th May 1837, and was for Rs. 240 repayable within two years with interest at 2 per cent. per mensem. It was by way of further charge on the land, and contained a promise on the part of the mortgagors to be personally responsible for the money.

The Principal Sadr Amin had, as regards interest, applied the rule that the interest could not be allowed to exceed the principal. He found in favour of the genuineness of only two of the mortgages.

On appeal, the Joint Judge held that that rule did not apply to mortgages. He found all three mortgages to be genuine, and decreed redemption on payment, within six calendar months, of Rs. 7,458-1-3 on account of principal and interest on account of these mortgages, and, in default, foreclosure.

On special appeal to this Court by the plaintiffs, the argument was limited to the principle on which interest should be calculated. The currency, it was admitted, should be *Chándvad*.

By Hindu law the amount of interest recoverable *at any one time* cannot exceed the principal: Manu, Ch. VIII. pl. 151; Mayukha, ch. V. Section 1, pl. 7; Steele, 78,263 (1st Edn.); 1 Dig. 52. pl. XLI., XLIII.: Reg. V. of 1827

Section XII. This is called the rule of *dámdupat*. It is still in force: *Dhondu* v. *Náráyan* (*a*), notwithstanding Act XXVIII. of 1855, which, it has been decided, has not abrogated the Hindu law in that respect: *Khushálchand* v. *Ibráhim* (*b*), *Rámkrishnabhái* v. *Vithobá* (*c*) and see per PEACOCK, C.J., in *Ramlal Mookerjee* v. *Haran Chandra Dhar* (*d*). Mr. Justice Phear has expressed some doubts as to the dicta of PEACOCK, C.J., in the last mentioned case (14 Calc. W. Rep. 308) and see *Annaji* v. *Ragubal* (*e*). In this Presidency, however, the question must be considered as settled by the Bombay cases already cited and by *Hukmá* v. *Memon Ayab* (*f*) and *Pándurang Ganesh* v. *Krishnaráv Anant* (Special Appeal No. 663 of 1864). In the latter case COUCH and WARDEN JJ., on the 25th of January 1865, affirmed the decree of Mr. Gonne, Acting Judge of Púṇa, who, by applying the rule of *dámdupat*, reduced a claim founded on two mortgages executed in 1844, and by which it was expressly agreed that the rule of *dámdupat* should not apply, from Rs. 25,000 to Rs. 5,848-5-6. Mr. Gonne, in an able judgment, holding that it was not competent for Hindus, in dealing with each other in such a case as that before him, to exclude by compact the operation of that rule, and stating it to be his opinion that the cases alluded to in Section XII. of Reg. V. of 1827, as those to which the rule of *dámdupat* would be inapplicable, must be cases of running account, and not mere debts on mortgage bonds, such as those before him.

Special Appeal No. 825 of 1864 was decided by FORBES and WARDEN JJ. on the same principles.

Special Appeal No. 638 of 1866, in which COUCH, C.J., and NEWTON and WARDEN JJ., affirmed a decree of the Judge at Sátára, was one of a running account. The mortgagee having been in possession on the ordinary terms of accountability for such rents and profits as he received or might with due diligence receive, the Judge held that in-

(*a*) 1 Bom. H. C. Rep. 47. (*b*) 3 Bom. H. C. Rep. A. C. J. 23.
(*c*) *Ibid* 25. (*d*) 3 Beng. L. Rep. O. J. 130.
(*e*) 6 Mad. H. C. Rep. 400. (*f*) 7 Bom. H. C. Rep. A. C. J. 19.

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terest did not cease to run on the principal moneys under Section XII. of Reg. V. of 1827.

Nathubhái v. *Mulchand* (*g*), decided in 1868 by COUCH, C.J., and NEWTON J., overruled the too broad proposition laid down in *Náráyaṇ* v. *Gangárám* (Special Appeal No. 384 of 1868), reported in the same Volume (p. A.C.J. 156) that the rule of *dámdupat* was not applicable to mortgages, and showed that it would be applicable, if there were only an account to be taken of principal and interest due on the mortgage, and no account of rents and profits on the other side. There was, however, in *Náráyaṇ* v. *Gangárám* a running account in respect of rent and profits.

In the present case by the mortgage bond of the 7th July 1834 for Rs. 401 (exhibit No. 12), the produce of the land is definitively fixed at Rs. 35 per annum with which the mortgagee was to be chargeable. That is deducted from the annual amount of interest at Rs. $1\frac{3}{4}$ per mensem the stipulated rate, and the balance Rs. 49 is stated to be the sum to be annually paid in cash, and for which the mortgagors were, by the terms of the mortgage bond, to be personally liable. The legal result then of that arrangement is this, that the mortgagees were to hold the land without liability to account for rents and profits, and that, in consideration for that, they (the mortgagors) instead of being liable to pay Rs. $1\frac{3}{4}$ per mensem interest on Rs. 401, were to pay Rs. 49 per annum in full of interest on that principal. Therefore, even admitting the mortgagees, as they were, to have been in possession, there could not, in respect of that mortgage bond (exhibit No. 12), have been any account of rent and profits taken.

Here the case of *Vithal* v. *Dáud* (*h*) is applicable. COUCH, C.J., says (p. 94): "But where the profits are by agreement to be received in lieu of a portion of the interest, no account can be taken of the profits, and the remaining portion of the interest must only be allowed for six years. The exhibit No. 6 provided that for a part of the debt no interest

(*g*) 5 Bom. H. C. Rep. A. C. J. 96.
(*h*) 6 Bom. H. C. Rep. A. C. J. 90.

should be charged, but that the profits should be enjoyed in lieu of interest. Where the Court does not order an account to be taken of the interest on the one side and of the rents and profits on the other, we have held that in cases to which Reg. V. of 1827 (Secs. 11 and 12) applies, that is, cases where the contracts were made before Act XXVIII. of 1855 came into operation, the arrears of interest must be limited to six years.' The effect is that where an account is not ordered, the parties are put into the same position as if the suit was simply one to recover the principal money and interest." This is such a case, the mortgage bond (exhibit No. 12) having been executed in 1834. Inasmuch as the interest upon that bond, taken as fixed in it, at Rs. 49 per annum, would, for six years, amount to Rs. 294 (the special character of the arrangement had the effect of excluding compound interest), and accordingly be less than the principal, that amount of interest may be allowed to the mortgagees. Had the interest, so calculated, exceeded the principal, such excess could not be allowed, as the effect of the concluding portion of Section XII. of Reg. V. of 1827 would be to render the rule of *dámdupat* applicable. It has been contended for the mortgagees that it would be very hard to apply the six years' rule in a case like the present, where the mortgage was for ten years, and the mortgagees could not file their plaint to foreclose until that time elapsed. There was not, however, anything to prevent them from suing the mortgagors personally for the interest which they had undertaken personally to pay; and, further, not only ten years, but thirty-eight years have elapsed since the date of the mortgage, and now at least the six years' rule would be applicable. The mortgagees, if such were their pleasure, might have taken proceedings to foreclose 28 years ago. It may here be observed that this is not a mortgage by way of conditional sale, although there is a sort of promise in it to convey to the mortgagees in default of due payment.

The rate of interest reserved by the Exhibits Nos. 7 and 8 (2 per cent. per mensem) is so high that six years' arrears of interest would in each case exceed the principal. The

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rule of *dámdupat* must, therefore, be applied to those instruments.

The account, therefore, will stand thus :—

		Principal.		Interest.		
First mortgage.	Rs.	401	+	294	=	695
Second do.	,,	425	+	425	=	850
Third do.	,,	240	+	240	=	480
Assessment (undisputed)		60				60
					Rs.	2,085

The decree of the Joint Judge, therefore, must be varied by directing that on payment to the defendants of Rs. 2,085 for principal and interest in *Chándvad* currency within six calender months from the 1st day of June, 1872, and the cost of the suit and Regular Appeal, the plaintiffs shall be at liberty to redeem the two fields Nos. 131 and 136 in the plaint mentioned : and, in default of payment of such principal, interest and costs within the said period of six calendar months, that the plaintiffs be for ever foreclosed from any right to redeem the said fields.

The defendants must pay to the plaintiffs their costs of this appeal, the amount thereof to be allowed by way of set off, so far as it will go, against the principal, interest and costs above directed to be paid to the defendants. On such redemption, as aforesaid, the possession of the said fields to be made over to the plaintiffs.