

APPELLATE CIVIL.

(47)

*Before Mr. Justice West and Mr. Justice Pinhey.*1879
February 17.

J. CARVALHO (ORIGINAL PLAINTIFF), APPELLANT, v. NURBIBI

AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act VIII of 1859), Sec. 194—Mortgage—Interest—Code.

In exercise of the discretion given by section 194 of the Code of Civil procedure (Act VIII of 1859), the Court of first instance gave a decree to the plaintiff making the amount awarded payable by instalments, but gave no interest after the institution of the suit. The Appellate Court amended the decree by awarding interest from the institution of the suit at six per cent, per annum, the rate originally contracted for being twenty-four per cent. per annum.

Held, that although the stipulated rate was properly awardable, the award of the lower rate was not illegal or beyond the competence of the Court below, with whose discretion the High Court will not interfere.

A mortgagee is, as a general rule, entitled to the costs of enforcing his security; but where the Court, in consideration of his usurious bargain, declines to award them wholly or in part, the High Court will not interfere.

THIS was a special appeal from the decision of Rs. F. Mactier, Judge of Satara, amending the decree of the Subordinate Judge of Satara.

The first and second defendants were the owners of a house which they mortgaged in 1873 to the plaintiff for Rs. 250, and subsequently sold to the third defendant for Rs. 551, and gave him possession. The purchaser had no notice of the plaintiff's previous mortgage, which stipulated the payment of interest on the amount secured at the rate of 24 per cent. per annum. The plaintiff in the suit sued to recover the money due to him with interest at the rate contracted for, and for a sale of the mortgaged property if necessary.

The first and second defendants did not appear. The third defendant contended that he had no notice of the mortgage, and that the rate of interest was extortionate.

The Subordinate Judge gave a decree for the plaintiff, but awarded no interest. The district Judge amended the decree by awarding interest and six per cent.

V. N. Mandlik for the appellant.

Manekshah Jehangirshah for the respondent.

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The judgment of the Court was delivered by

WEST, J.—The Courts below, out of consideration for an innocent purchaser forced to satisfy a mortgage, awarded payment by instalments at short intervals. We do not think this was unreasonable under the circumstances.

The rate of interest contracted for was 24 per cent. per annum. The Court of first instance, acting on the discretion given by the section corresponding to section 210 of the New Code of Procedure, (1) gave no interest after the institution of the suit. The District Court awarded interest from the institution of the suit at six per cent. per annum. It is urged that the stipulated rate was properly awardable, and that the Courts were, in fact, bound to award it until satisfaction of the decree in favour of the mortgagee. For the former branch of this proposition there is ample authority, and there are many decisions in which the High Courts have amended decrees which made a new contract for the parties as to interest prior to the litigation; but no case has been cited in which it has been held that when the Court below had exercised its discretion in giving from the institution of the suit a rate lower than that stipulated, a High Court has pronounced this illegal or beyond its competence.

The District Court, while thus giving six per cent. interest, threw the costs of the appeal on the appellant, whose bargain it considered usurious. The general rule, no doubt, is that a mortgagee is entitled to the costs of enforcing his security against one who disputes it, but this is not prescribed by any express regulation. The decision in *Desaji Lakhmaji v. Bhavanidas Narotamdas*, (2) which was followed in *Balkishna Abaji v. Vishnu Raghunath*, (3) seems to prevent our interfering, under these circumstances, with the decision of the District Judge, and we must confirm his decree. Each party to bear his own costs in this Court.

Decree affirmed.

(1) See sec. 194 of Act VIII of 1859. (2) 8 Bom. H. C. Rep. 100, A.C.J.

(3) See Printed Judgments for 1875, page 56.