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PRIVY COUNCIL.

17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

military jaghir. This was done by the Government on political considerations, and the tenure thereby created was political. This was the view taken by the Government in 1876, when it adopted the report of the Alienation Settlement Officer, that "the whole estate intact, saranjam and inam, as restored after the war under the treaty of 3rd July, 1820, is continuable as a guaranteed estate to the adopted son" (Ajmodin) "as the head of the family."

Their Lordships therefore concur in the opinion expressed by the Governor in Council that a mixed estate of saranjam and inam was granted by the treaty of July, 1820, to be held on the same political tenure, and passed intact to the person whom the Government might recognize as the head of the family, and that it is not competent for any Court of law to dispute it.

[457] In this view of the case it is unnecessary to consider the various other questions which have been discussed on the argument of this appeal.

Their Lordships will humbly report to Her Majesty that the decision of the Governor in Council be affirmed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Blount, Lynch, and Petre.*

Solicitors for the respondent:—Messrs. *Burton, Yeates, Hart and Burton.*

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17 B. 457 = Chitty's S.C.C.R. 367.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DADA BHOY DAJIBHOY BARIA (*Plaintiff*) *v.* PESTONJI MERWANJI BARUCHA (*Defendant*).* [27th January, 1893.]

Contract—Consideration—Compromise of a bona fide claim a good consideration—Agreement to lend money on mortgage—Delay in completion of agreement—Subsequent agreement to pay interest from a certain date—Consideration for such agreement—Right to rescind—Time of essence of contract—Suit by lender against borrower.

On 31st August, 1891, the plaintiff agreed to lend the defendant Rs. 30,000 on a mortgage. By the agreement the mortgagor (defendant) was to clear the title, and the time fixed for completion of the agreement was eight days from its date. The mortgage was not completed within the stipulated time, in consequence of the non-production of the title-deeds by prior mortgagees, who were to be paid off out of the money to be advanced by the plaintiff. On the 9th September, 1891, the plaintiffs solicitors wrote to the defendant reminding him that the time for completion had expired, and stating that the plaintiff would require interest to be paid on the money which he had with him lying idle on the defendant's account. On the 24th September, 1891, the plaintiff formally tendered the Rs. 30,000 to the defendant, but as no mortgage-deed was then ready for execution the money was not then paid. The plaintiff was always ready and willing to advance the money but in consequence of the defendant's delay he insisted on interest being paid from the 24th September, 1891. The title-deeds were ultimately produced at the end of November or the beginning of December, and on 7th December, 1891, the draft mortgage was sent to the defendant for approval. It contained a clause stipulating for payment of interest from 24th September, 1891. On the 9th **[458]** December, 1891, the plaintiff had an interview with the defendant. The two points then discussed

* Small Cause Court Suit No. 259—17662 of 1892.

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were (1) what time after due date should be allowed to the defendant (mortgagor) for payment of interest; (2) whether interest on the principal sum should run from the 24th September, 1891. On the first point the plaintiff gave way, allowing defendant fifteen days instead of eight as originally provided. As to the second point, he declined to advance the money unless interest was paid from the 24th September, 1891. The defendant ultimately agreed to this. The mortgage-deed was duly engrossed, with a stipulation for payment of interest from the 24th September 1891, and the 26th January, 1892, was fixed as the day for execution. On that day, however, one of the defendant's daughters who had to execute the deed was absent, and the plaintiff refused to advance the money until her signature was obtained. Subsequently the defendant refused to sign the deed on the ground that it contained the clause for payment of interest from 24th September, 1891. He contended that he was not liable to pay interest from that date. The plaintiff brought this suit, claiming Rs. 1,865-12-0 as damages for the defendant's breach of agreement. The lower Court held that although the original agreement of 31st August, 1891, mentioned no date from which interest should run, the defendant on the 9th December, 1891, had agreed to pay it from 24th September, 1891, and had made no objection on the point until February, 1892. The defendant contended that, if such an agreement was made on the 9th December, 1891, it was without consideration, but the Court held that the plaintiff was at that date at liberty to rescind the agreement altogether, and that he had consented not to rescind in consideration of being paid interest from the 24th December, 1891. The lower Court accordingly passed a decree for the plaintiff.

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Held, that in any case, under the circumstances, there was consideration for the agreement made by the defendant to pay interest from the 24th September. The plaintiff clearly regarded himself as entitled to rescind, and at the defendant's request agreed to forbear to do so if the defendant would consent to pay interest from the 24th September, 1891. The claim of the right to rescind was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an inducement to the defendant to agree to the plaintiff's terms, and the principle laid down in *Miles* v. *New Zealand Alford Estate Co.* (1) applied.

[R., 6 Ind. Cas. 651 (652) = 47 P.W.R. 1910; 20 Ind. Cas. 429.]

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit filed by the plaintiff to recover a sum of Rs. 1,865-12-0 as damages alleged to have been suffered by him in consequence of the defendant's breach of agreement to borrow from the plaintiff a sum of Rs. 30,000 on the security of three properties belonging to the defendant.

[459] 2. The original agreement for mortgage, as to which there is no dispute, bears date the 31st August, 1891, and provides for a loan of the sum of Rs. 30,000 with interest at the rate of 9 annas per cent. per mensem. The mortgagor was to clear the title, and the time fixed for the completion of the agreement was eight days from its date.

3. The facts of the case, as found by me, were as follows :— The mortgage was not completed within the time stipulated, in consequence of the non-production of the title-deeds by prior mortgagees, who were to be paid off out of the moneys advanced by the plaintiff. The same solicitors, Messrs. Little, Smith, Frere, and Nicholson, were acting for both parties and continued so to act up to the end of January, 1892.

4. On the 9th September, 1891, the solicitors sent a letter to the defendant reminding him that the time for completion had expired, and saying that the plaintiff would require interest to be paid on the money

(1) 32 Ch. D. 266.

which he had with him lying idle on the defendant's account. It was, however, thought that a formal tender should be made, and the sum of Rs. 30,000 was accordingly offered to the defendant on the 24th September 1891, but as no deed was then ready for execution, it was not paid. The idea of tender was no doubt erroneous, but it was from the date of the tender, 24th September, 1891, that the plaintiff claimed that interest should run. Putting aside the question of tender as immaterial, I considered that it was nevertheless open to the plaintiff to decline to carry out the agreement, the time for completion of which had gone by, unless the defendant agreed to pay interest on the money from that date, and this was in effect the position taken up by the plaintiff.

5. There was further delay owing to the non-production of the title-deeds by the defendant, on whom it lay to clear the title. There was no imputation of laches on the part of the plaintiff, who was always ready and willing to advance the money, but, in consequence of the defendant's delay, insisted on interest being paid thereon from the 24th September, 1891.

6. The deeds were ultimately procured at the end of November, 1891, or beginning of December, and on the 7th [460] December, 1891, the draft mortgage was sent to the defendant for his approval. This draft contained a stipulation for the payment of interest from the 24th September, 1891. The draft was read over to the defendant by his son Cowasji Pestonji (they both read and understood English well) and certain pencil alterations were made by Cowasji: *inter alia* the words "24th day of September, 1891," were scored through with a pencil line and other words written in pencil above them.

7. On the 9th December, 1891, the defendant and Cowasji brought plaintiff to Messrs. Little, Smith, Frere and Nicholson's office, where the matter was discussed in the presence of Byramji Darasha, the Managing clerk. The two main points in dispute were (1) as to what time after due date should be allowed to the mortgagor for payment of interest, and (2) whether interest on the principal sum should run from 24th September, 1891. On the first point the plaintiff gave way, allowing the defendant fifteen days instead of eight as originally provided. With regard to the second point, they declined to accede to the defendant's request, or to advance the money on any other terms, and the defendant ultimately agreed to pay interest from the 24th September, 1891. The pencil alterations in the draft were then written in red ink by Cowasji, except with regard to the words "24th day of September, 1891," where the pencil line and words written above were rubbed out by him. Cowasji then endorsed on the draft "approved as within altered for self and others, 9-12-91" and this was signed by the defendant.

8. There was some further delay on the part of the defendant in getting the necessary power of attorney from one of his prior mortgagees who was absent from Bombay, but ultimately the 26th January, 1892, was fixed as the day for execution. The mortgage-deed was engrossed and contained the stipulation for payment of interest from 24th September, 1891. On the 26th January, 1892, the defendant, his wife, sons and daughters (except Perozbai) attended at the office of Messrs. Little, Smith, Frere and Nicholson to execute the deed, which they were prepared to do. As, however, Perozbai was absent, the plaintiff, acting on the advice of Mr. Nicholson, declined to advance the money until her [461] signature was obtained, and another day was to be fixed for execution. No mention was at that time made of the date from which

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interest was to run, nor did the defendant or his sons raise any objection to the form of deed as engrossed.

9. In the beginning of February the defendant consulted other solicitors, but it was not until the 13th February, 1892, when they had written for and obtained a copy of the agreement, that the present contention was raised that the defendant was not liable to pay interest from the 24th September, 1891. It is true that the agreement of the 31st August, 1891, made no mention of the date from which interest should run, but I considered that that did not prevent the parties from subsequently making a verbal agreement which should be binding on the defendant. I found, therefore, that in this case the defendant did, on the 9th December, 1891, agree to pay interest on the principal sum from the 24th September, 1891, and that he made no objection to such agreement until the 13th February, 1892. It was argued that such agreement if so made was without consideration, but I held that the fact of the plaintiff being at liberty to rescind the agreement and consenting not to do so on payment of the interest, was sufficient consideration for such verbal agreement.

10. It was further argued for the defendant that no suit for damages would lie in cases of this kind, and the case *Bain* v. *Fothergill* (1) and similar cases were cited. I held, however, that the law on such matters in this country was as laid down in ss. 73 and 74 of the Indian Contract Act, IX of 1872, and for the proposition that such cases fall within the purview of those sections I was bound by the decision of Farran, J., in the very similar case of *Datubhai Ebrahim* v. *Abubaker Moledina* (2).

11. In this case I considered that damages should be awarded on the footing of the loss of interest sustained by the plaintiff from the 24th September, 1891, until such date as he could be reasonably expected to be able to invest his money on a similar security. Farran, J., allowed four months from the date on which the defendant ultimately repudiated the contract, and I accordingly allowed a similar period, namely four months, from **[462]** the 19th February, 1892. The plaintiff's money or the major portion of it was on current account with the Hongkong and Shanghai Banking Corporation, where interest at the rate of 2 per cent. per annum was allowed up to the 31st December, 1891, and 1 per cent. after that date. I accordingly deducted this from the contract rate of $6\frac{3}{4}$ per cent. and awarded to the plaintiff Rs. 1,197-11-2, being interest on Rs. 30,000 at $4\frac{3}{4}$ per cent. per annum from 24th September, 1891, to 31st December, 1891, and at $5\frac{3}{4}$ per cent. per annum from 1st January, 1892, to 19th June, 1892. I also awarded the plaintiff his costs of the abortive loan, the amount of which it was agreed should be the amount of the bill of costs when taxed, including the costs of taxation it allowed. I also certified the plaintiff's professional costs at Rs. 180.

12. The defendant's counsel requested me to state a case for the opinion of their Lordships on the following questions:—

(i) Whether the defendant was bound to execute the engrossment of the mortgage-deed in the form presented to him on the 26th January, 1892?

(ii) If yes, whether he is liable to the plaintiff in any and what damages?

And I accordingly made my judgment contingent on such opinion.

13. The defendant has deposited Rs. 1,800 in Court as security for the plaintiff's claim together with Rs. 50 to meet the costs of reference.

(1) 7 H.L.C. 158. (2) 12 B. 242.

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Anderson, for the defendant:—The defendant has not committed a breach of the agreement of 31st August, 1891, and is, therefore, not liable to the plaintiff. Under that agreement he was not bound to pay interest from the 24th September, 1892, and he was, therefore, justified in refusing on the 26th January, 1892, to execute a mortgage-deed, which provided that he should do so. It is said that there was a new agreement on the 9th December, 1891, by which he agreed to pay the interest. We deny there was such an agreement. But, in any case, the plaintiff gave no consideration for it, and it was, therefore, invalid. It is suggested that the plaintiff was entitled to rescind the first agreement [463] and that he agreed not to do so if the defendant would pay interest. That is the alleged consideration for the new agreement. But the plaintiff was not entitled to rescind, for time was not and had never been made of the essence of the contract. So there was no new agreement, and the first agreement was still in force in January, 1892, and the defendant was not, therefore, bound to execute the mortgage-deed which was prepared, and the plaintiff is not entitled to compensation. Section 55 of the Contract Act (IX of 1872) does not apply to contracts of sale or mortgage of land. Moreover, defendant's promise to execute a mortgage in eight days was dependent on the plaintiff's promise to have the deed ready within that time. He cited Pollock on Contract (3rd Ed.), p. 478; *Bain* v. *Fothergill* (1); *Rowe* v. *The London School Board* (2); Dart's Vendors and Purchasers (6th Ed.), pp. 483, 1083.

Lang and *Rivett-Carnac*, for the plaintiff:—The Court is bound by the finding of the Chief Judge that there was a new agreement for good consideration on the 9th December, 1891. The mortgage-deed to be executed was necessarily prepared in accordance with that new agreement, and the defendant was bound to execute it.

[SARGENT, C. J.:—Do you say time was of the essence of the contract?]

We say it was, but we say the agreement of the 9th December, 1891, was good whether or not. Even supposing the plaintiff had no legal right to rescind the original agreement, yet if he *bona fide* believed he had, and threatened to do so, unless he were allowed the additional interest, and if under those circumstances the defendant agreed to the new terms, the agreement then made is binding—*Miles* v. *New Zealand Alford Estate Co.* (3); *Callisher* v. *Bishoffscheim* (4).

JUDGMENT.

SARGENT, C. J.—The answer to the first question, whether the defendant was bound to execute the mortgage tendered to him by the plaintiff, on the 26th January, 1892, must depend upon whether the agreement bythe defendant on the 9th December, [464] 1891, that the mortgage to be executed should contain a clause that interest should run from the 24th September, 1891, was binding on him. The Chief Judge of the Small Cause Court has found that the plaintiff on that day declined to accede to the defendant's request to advance the money unless the defendant consented to the above clause being inserted in the document, but it is said that there was no consideration for the agreement, and, therefore, that the defendant, if he thought proper, could change his mind and decline to execute a mortgage, except in the form prescribed by the

(1) 7 H. L. C. 158.
(2) 57 L.T. 182.
(3) 32 Ch. D. 266.
(4) L. R. 5 Q.B. 449.

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contract, which provided that interest should run from the execution of the mortgage.

It appears from Mr. Chitty's judgment that he considered that the eight days mentioned in the contract was of the essence of the contract, and if this were so, it cannot be doubted that the plaintiff's forbearance to treat the contract as at an end on the 9th December, if the defendant agreed to the insertion of the clause, would be a good consideration for such agreement. But it was argued that time was not of the essence of this contract. We may remark that the case in I. L. R., 12 Bom., 242, which was referred to in argument by the plaintiff, has no bearing on that point. In that case subsequently to the execution of the contract, the parties definitely agreed that the contract should be finally settled on the 1st March, 1887, and the only question for decision was as to the compensation the plaintiff was entitled to by the defendant's default in performing his part of the contract on that day. If it were necessary to decide the question, we can scarcely doubt that in such a contract it must be presumed that it was not the intention of the parties that the eight days, mentioned in it, should be of the essence of the contract. However, we think that under the circumstances of this case, it is not material to decide the question, as the case of *Miles* v. *New Zealand Alford Estate Co.* (1) shows that there was good consideration for the agreement, although the plaintiff may not have had the strict right he claimed to have on the 9th December of treating the contract at an end. The Judges in that case, although differing as to the application of the rule under the circumstances of the case, were **[465]** all agreed that the forbearance to enforce a real *bona fide* claim is a good consideration for an agreement, although not one which the Court would have given effect to. Here, although the judgment of Fry, J., in *Green* v. *Sevin* (2) shows that, strictly speaking, the plaintiff's right on the 9th December was not to rescind the contract, but to give the defendant notice that he would rescind if the defendant did not complete within a reasonable time (which in the present case would have been a very short period, as the matter has been going on ever since 31st August), still the plaintiff clearly regarded himself as entitled to put an end to the contract, and agreed at the defendant's request to forbear to do so if the defendant would consent to pay interest from the 24th September, 1891. The claim of the right to rescind at once was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an inducement to the defendant to agree to the plaintiff's terms. We think that under these circumstances the principle laid down in *Miles* v. *New Zealand Alford Estate Co.* (1) applies, and that there was, therefore, good consideration for the agreement of the 9th December, 1891.

The first question must be answered in the affirmative. As to the second question it cannot be doubted that the plaintiff became entitled to compensation when the defendant finally refused to execute the mortgage with the added clause to which he had agreed, and no argument was addressed to us to show that the compensation was improperly assessed by the Small Cause Court either in manner or account.

The plaintiff to have his costs of the reference, to be taxed by the Taxing Master as on the original side of the High Court.

Attorneys for the plaintiff: Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for the defendant: Messrs. *Ardesir, Hormasji and Dinsha.*

(1) 32 Ch. D. 266. (2) 13 Ch. D. 589.