APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

NARAYAN VITHAL MAWAL (ORIGINAL DEFENDANT), APPELLANT, *v.* RAOJI BIN MOROJI DHOLE (ORIGINAL PLAINTIFF), RESPONDENT.* 1904. *February* 25.

Decree—Execution—Claim of interest not provided by the decree—Acquiescence.

A mortgage decree ordered payment of Rs. 1,415-10-6 before March, 1886, but contained no provision as to interest. In execution of this decree the defendant presented several applications (*darkhasts*), the last of which was in 1898, whereby he sought to recover Rs. 2,570-4-5 as principal and interest and in default to have the amount realized by sale of the property. On the 2nd March, and again on the 7th August, 1900, the judgment-debtor got the sale postponed saying that he would satisfy the decree. On the 12th October, 1900, the plaintiff again asked for extension of time to enable him to pay the debt and interest also. On the 29th July and the 17th August, the plaintiff obtained further extensions, but was not able to satisfy the decree. At last, on the 20th September, 1902, he (plaintiff) for the first time disputed the right of the defendant to claim interest on the ground that the decree did not award any :—

PER CURIAM:—The plaintiff's application of the 12th October, 1900, contained a distinct promise to pay interest . . . . rightly or wrongly he represented to the Court that he was liable to pay interest as claimed in the *darkhast*, promised to pay it, and on the strength of that representation and promise he obtained from the Court adjournments from time to time. He must . . . . be treated as having contracted an obligation to pay interest on the decretal amount from the 12th October, 1900.

SECOND APPEAL from the decision of A. Lucas, District Judge of Poona, reversing the order passed by P. V. Gupte, First Class Subordinate Judge at Poona.

The defendant obtained in 1886 a decree in a redemption suit against the plaintiff. The decree awarded to the defendant Rs. 1,415-10-6 and in default the property was to be sold. There was no provision about interest in the decree.

In execution of this decree the defendant presented several *darkhasts* (applications), the last having been presented in 1898. In this application the defendant sought to recover Rs. 2,570-4-5 as principal and interest; and he prayed that in default of payment the property might be sold and the amount realized.

* Second Appeal No. 533 of 1903.

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On the 2nd March, 1900, the plaintiff asked for and obtained a postponement of the sale for six months to enable him to pay the debt. On the 7th August, 1900, the plaintiff obtained from the Court sanction to execute a mortgage or *kabulayat* to the creditor.

On the 12th October, 1900, the plaintiff again obtained extension of time so that he might pay the debt as well as the interest. On the 29th July, 1901, the plaintiff succeeded in obtaining from the Court an extension for three months. And on the 17th August, 1901, the plaintiff asked the Court for sanction to mortgage the property to satisfy the decree. The Court granted the prayer but the plaintiff was not able to satisfy the decree as proposed by him.

Finally, on the 20th September, 1902, the plaintiff for the first time disputed the right of the defendant to claim interest on the ground that the decree made no provision for interest.

The Subordinate Judge rejected the plaintiff's application holding that the conduct and admission of the plaintiff estopped him from raising the issue about interest.

The District Judge on appeal reversed this order on the ground that under the circumstances there could be no agreement binding on the plaintiff, and it cannot be said that the agreement was sanctioned by the Court.

The defendant appealed to the High Court.

G. S. Rao, for the appellant (defendant) :—We contend in the first place that the appellate decree varied only the rate of interest prior to the date of suit and did not modify the decree of the Subordinate Judge as regards payment of interest till the date of payment. Even if it be held that the decree of the Appellate Court did not award interest till date of payment, then as the judgment-debtor did not question the amount claimed by the appellant in his *darkhast* it must be held that he accepted his liability to pay interest although it was not allowed by the decree. In his application dated the 12th October, 1900, the judgment-debtor made an application to the Court that the decree awarded interest and that he was willing to pay the amount claimed in the *da khast* and prayed for six months' time to pay the debt. In subsequent applications he prayed to the

same effect. Thus the judgment-debtor having agreed to pay interest is bound to make good his promise: see *Sadasiva Pillai* v. *Ramalinga Pillai*[1], followed in *Lakshmana* v. *Sukiya Bai*.[2]

Next, the judgment-debtor having induced the judgment-creditor to agree to an adjournment is now estopped from saying that the decree did not award interest from payment: see *Sarat Chunder Dey* v. *Gopal Chunder Laha*.[3]

Kazi Kabiruddin (with *P. P. Khare*), for the respondent:—The decree of the Appellate Court awarded only a definite sum and did not award any interest subsequent to the date of the decree. So when the creditor claimed, and the judgment-debtor did not object, or agreed to pay interest till payment, both parties were labouring under a mistake of fact and the agreement is therefore void: see section 20 of the Indian Contract Act (IX of 1872).

As the judgment-creditor himself shared in the mistake about the terms of the decree it cannot be said that the creditor was induced to consent to the adjournment by the admission of the defendant in his application and the principle of estoppel therefore will not apply to the present case. And in the words of the Privy Council where the truth of the matter appears on the face of the record the doctrine of estoppel has no application: *Tara Lal Singh* v. *Sarobar Singh*[4]. We therefore contend that the plaintiff's prayer for interest should be disallowed.

CHANDAVARKAR, J.:—The question of law which arises in this case depends upon certain facts which are not disputed and are as follows.

On the 15th January, 1885, a decree was passed in a redemption suit directing the plaintiff to pay Rs. 1,868-1-10 and interest at 8 annas per cent. per month from the date of the suit till realization on Rs. 1,331-11-4.

Against that decision there was an appeal and the Appellate Court varied the decree by awarding to the plaintiff Rs. 1,415-10-6 to be paid before the month of March (1886-87) and in default the property was to be sold.

(1) (1875) 2 I. A. 219.
(2) (1884) 7 Mad. 403.
(3) (1892) 20 Cal. 296.
(4) (1899) 27 Cal. 407, at p. 413.

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The defendant presented several *darkhasts*. The present is his last *darkhast*, whereby he seeks to recover Rs. 2,570-4-5, which is the sum total of the principal and interest which he claims as having been awarded to him by the decision of the District Court: and he also asks that in default of payment of the sum the property might be sold and the amount realized.

On the 2nd March, 1900, after the presentation of the above *darkhast*, the plaintiff asked the Court to postpone the sale for six months promising to pay the debt within six months. The defendant consented and an adjournment was granted. On the 7th August, 1900, the plaintiff appeared before the Court and pleaded inability and asked for sanction to execute a mortgage or a *kabulayat* in favour of the creditor. The Court granted the prayer.

On the 12th October, 1900, the plaintiff again appeared before the Court and asked for further extension of time to enable him to pay the debt and interest also.

On the 29th July, 1901, the plaintiff asked for a further extension of six months and the Court granted him three months. On the 17th August, 1901, the plaintiff asked the Court for sanction to mortgage the property and satisfy the decree, and the Court granted one month. The plaintiff, however, was not able to satisfy the decree as he had proposed. On the 29th September, 1902, for the first time he disputed the right of the defendant to claim interest on the ground that the decree of the Appellate Court did not award any.

There is no doubt that that decree is silent as to interest and the defendant (appellant) cannot claim it, if his right depended upon the decree alone. But it is contended for him by Mr. Rao that, having regard to the plaintiff's conduct, disclosed by his applications presented to the Subordinate Judge, the plaintiff is estopped from disputing the defendant's right to claim interest. But the difficulty in applying the principle of estoppel to the facts of the case lies in this, that it cannot be said, that it was the plaintiff's act or declaration that he is liable to pay interest according to the terms of the decree, which caused the defendant to believe that the decree had awarded interest. Before any act was done or declaration made to that

effect by the plaintiff, the defendant himself had in his *darkhast* presented to the Court asserted his right to claim interest, believing that the decree had awarded it. Under these circumstances it cannot be said that the statement of the plaintiff that he was liable to pay interest was the proximate cause which led the defendant into the mistaken belief that the decree awarded interest. Moreover, both parties must be treated as having known the terms of the decree which were clear, and "there can be no estoppel when the truth of the matter appears, as it does in the present case, on the face of the proceeding": see the dicta of the Privy Council in *Tara Lal Singh* v. *Sarobar Singh*.[1] As has been held by the Privy Council, section 115 of the Evidence Act does not apply where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement: *Mohori Bibee* v. *Dhurmodas Ghose*.[2]

But though the plaintiff is not strictly speaking estopped, his application of the 12th October, 1900, contained a distinct promise to pay interest. No doubt that promise was founded on his erroneous belief that under the decree he was liable, but, whether rightly or wrongly, he represented to the Court that he was liable to pay interest as claimed in the *darkhast*, he promised to pay it, and on the strength of that representation and promise he obtained from the Court adjournments from time to time. He must, under these circumstances, be treated as having contracted an obligation to pay interest on the decretal amount from the 12th October, 1900. Had he then disputed the defendant's right to interest, the defendant would have objected to any adjournment being granted and insisted upon his right to bring the mortgaged property to sale at once and realize the decretal amount. The defendant did not object, because the plaintiff agreed to pay interest.

The case, therefore, falls within the principle of the decision of the Privy Council in *Sadashiva Pillai* v. *Ramalinga Pillai* [3] where the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*. That decision was

(1) (1899) 27 Cal. p. 413. (2) (1903) 30 I. A. 114 at p. 122.
(3) (1875) 2 I. A. p. 233.

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followed by the Madras High Court in *Lakshmana* v. *Sukiya Bai*.[1]

Relying upon this last decision Mr. Rao asks us to award interest as claimed by the defendant in his *darkhast* because, he urges, the plaintiff agreed to pay interest *as claimed in the darkhast*. No doubt the plaintiff did so agree. But his agreement to pay interest on the principal sum awarded by the decree from the date of the decree was founded upon his mistaken belief that he was already liable under the decree to pay it. That mistake was also shared by the defendant. So far the contract was vitiated by the mutual mistake of both the parties as to the terms of the decree. It was a mistake as to the private rights of the parties and as such a mistake of fact (see Leake on Contracts, page 288). The contract was, therefore, void because it was entered into under a mistake as to a matter of fact essential to the agreement. True both parties knew the terms of the decree, but both misconstrued it. Under these circumstances the defendant cannot claim interest except so far as he has really suffered from the plaintiff's mistake. All that the defendant can legally claim is that the contract being void for a mistake of fact, the plaintiff, who has received advantage under such agreement, is bound to make compensation for it to the defendant: see sections 65 and 73 of the Contract Act. Had the defendant insisted on his right to execute the decree, the plaintiff's property would have been sold and the decretal debt realized. By means of the agreement the plaintiff kept the defendant out of his money and has had himself the advantage of it. He must, therefore, pay interest at the rate claimed in the *darkhast* from the 13th October, 1900, up to the date of payment and not from any earlier period. In *Lakshmana* v. *Sukiya Bai*[1] the agreement was not void for any mistake of the parties but was entered into deliberately as an agreement to pay interest not awarded by the decree.

(1) (1884) 7 Mad. 400.