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GANPAISING HIMATSING v. BAJIBHAI MAHMAD.

The District Judge thinks that the respondent is entitled to deduct the whole of the time from the date of the submission to the Officer to the date on which the claim was considered and rejected by the latter, because submission, in the learned Judge's opinion, means "an attempt to explain and press the claim or an effort to settle it," which in the present case was made, says the learned Judge, when the Officer rejected the respondent's claim on the 12th of August 1908. He relies in support of that view on a dictum in the judgment of the learned Chief Justice of this Court in *Purushottam* v. *Rajbai*[1]. That dictum bears no such meaning as the District Judge attributes to it.

The decree must, therefore, be reversed and the *darkhást* disallowed with costs throughout on the respondent.

Decree reversed.

R. R.

(1) (1909) 34 Bom. 142.

PRIVY COUNCIL.

MADAPPA HEGDE AND OTHERS (PLAINTIFFS) *v.* RAMKRISHNA NARAYAN BHATTA AND OTHERS (DEFENDANTS).

P. C.*
1911.
June 13.

[On appeal from the High Court of Judicature at Bombay.]

Mortgage—Construction of mortgage—Mortgage with interest partly in kind and partly in cash—Interest when payable—Suit for arrears of interest—Words amounting to covenant to pay year by year.

In this case their Lordships of the Judicial Committee held (reversing the decision of the High Court) that on the true construction of the mortgage there was clearly a personal covenant to pay interest on the mortgage-money from year to year, and that the suit, which was for arrears of interest, was therefore maintainable.

APPEAL from a judgment and decree (22nd January 1908) of the High Court at Bombay, which reversed a decree (23rd December 1905) of the Subordinate Judge of Karwar.

* *Present:*—Lord Macnaghten, Lord Shaw, Lord Mersey and Mr. Ameer Ali.

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The question for determination in this appeal was whether on the construction of a mortgage-deed, dated 21st July 1893, executed by the respondents in favour of the father of the appellants, the suit was or was not maintainable. The Courts in India differed in the construction of the deed, the Subordinate Judge substantially decreeing the appellants' claim and the High Court dismissing the suit.

The plaint stated that Ramkrishna Narayan Bhatta, the first defendant, for himself and also as manager of the joint family of which he was a member executed the mortgage-deed in suit to secure the payment of Rs. 30,000 mentioned in the mortgage as due by him and for interest on that sum. The mortgagor stipulated, among other things, that he would pay a sum of Rs. 200 in cash, and give bunches of betelnuts and other articles on 21st July 1894; that subsequently he would on 21st May in every year, or within two months after that fixed date, pay Rs. 1,200 in cash in respect of the interest accruing for the year on the said money, at the rate of 4 per cent. per annum, and also give the articles mentioned above; that in default of so paying he would personally pay the interest in arrears, together with compound interest on the same at the rate of 4 per cent. per annum, and that he would repay the principal amount within 40 years.

The material portions of the mortgage-deed according to a translation from the Kanarese original instrument made by Pandurang T. Koppikar (specially authorised translator) for the purpose of this appeal were as follows :—

"I have passed this document in writing mortgaging the properties to be mentioned below for the total (of all the abovenamed sums, namely) Rs. 30,000 thirty thousand and for the interest (thereon) to be paid in the manner described below and making myself liable to pay the said sum on the responsibility of these properties and in case they should prove insufficient (to realise the above sum), to pay (the deficit) personally. . . . . Until I pay you Rs. 30,000 (in words) thirty thousand under this agreement, I shall pay interest in the following manner :—The interest on this principal amount from this day forth up to the same date next year, *i. e.*, for one year, is settled to be Rs. 200 (in words) two hundred in cash and five loads of plaited cocoanut branches worth ten annas, ten bamboos of the kind called Shami Bidru worth five annas, 50 fifty bundles of betel leaves worth eight annas, 12 twelve

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bunches of ripe betelnut worth two rupees, 30 thirty jack fruits worth one rupee, five bunches of betel-tree flowers worth five annas, and also hundred bundles of dried leaves. Of these, the cash money and jack fruits I shall give on the 21st day of the month of May in the ensuing year 1894 A.D., and the bundles of betel leaves and bunches of betelnuts and also bunches of betel tree flowers on the 30th of the dark half of Kartik next and the bundles of cocoanut branches and Shami bamboos and also dried leaves on the 30th of the dark half of Magh next. And thereafter from the beginning of the second year, each year cash interest at the rate of 4 per cent. per year amounting to Rs. 1,200 twelve hundred, five loads of cocoanut branches, ten bamboos, fifty bundles of betel leaves, twelve bunches of betelnuts, thirty jack fruits, five bunches of betel tree flowers, and also hundred bundles of dried leaves,—so much interest for each year as mentioned above I shall pay you that year, also on the dates mentioned above and go on taking (a) receipt (*Ishtu í mérégé baddiannu áyáya varushadalli mélkanda vaidégalanté saha nánu nimagé kottu rashidi tégédu colluttá barutténé*).* And (of the items) of this interest, jack fruits and dried leaves I shall deliver in the village of Navilgon and all the remaining items I shall deliver over at your house in the village of Karki from time to time. And I shall pay you the principal amount Rs. 30,000 (in words) thirty thousand within 40 forty years from this date in one sum together with the interest that might remain in arrears and take back this agreement with receipt (of the above) endorsed thereon together with the documents placed herewith. If I should fail to pay the principal (sum of) money within the period stated above, I shall pay forthwith on your demand the principal and interest including interest at the same rate for the subsequent period up to the date of payment. But until then if out of the interest due for each year the money payable in cash should not be paid within the date mentioned above and the interest so omitted to be paid in time should remain unpaid by me even within two months after that date, I shall, thereafter, pay compound interest at the rate of 4 per cent. per annum on the said sum of interest. . . . . And although a period of 40 years is mentioned as the time within which the principal sum is to be paid off, if perchance, before the expiry of the said period, it be convenient to me to pay

* This is a transliteration of the sentence in the original. The actual expression used in the original is "baddi kottu" which standing by itself may be literally translated as "having paid interest." The word "kottu" being a perfect participle. According to the grammar and idiom of the Kanarese language, however, when there are more principal verbs than one in a sentence, they are not joined together by the conjunction "and" as in English, but all the verbs except the last one are converted into conjunctive or perfect participles, and the last verb indicates the tense, person etc. of the verbs. (*Vide* rule 225 of Thomas Hodson's Kanarese Grammar, 2nd edition, page 98, and rules 287 and 289 of A. S. Mudbhatkal's Kanarese Grammar, 1st edition, p. 184.)

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and I offer to pay a sum not less than 1,000 one thousand rupees as part of the principal within two months after paying the cash interest due every year or by the 21st of July every year, you should receive the same without pleading the excuse of the said 40 years' period and pass to me a receipt duly registered. And immediately after the whole principal sum of Rs. 30,000 thirty thousand is accordingly paid in full this deed is to be returned (to me) with an endorsement of payment. In that case when as above sums are paid in payment of the principal, interest on the remaining principal and the other articles (in respect of interest) are to be paid as mentioned above. As to the interest in cash, however, you are to receive the same at the rate of 4 per cent. per annum on the principal sums in balance (after each part payment) until the whole of the principal is paid off."

The plaintiffs stated that since the execution of the deed the defendant had paid in respect of interest only Rs. 1,035 consisting of cash and articles according to the agreement; and the defendant had not paid the interest due to date since 21st May 1898. The plaintiffs therefore brought the present suit on 18th July 1904 and prayed for a decree awarding them "(*a*) Rs. 7,200 cash interest for the six years from 21st July 1898 to 21st July 1903 at the rate of Rs. 1,200 in cash per year in respect of the abovementioned hypothecation-deed, and (*b*) Rs. 1,005-9-6 compound interest to date on the amount of interest due for the said six years according to the terms of the agreement." The total amount claimed was Rs. 8,205-9-6.

Written statements were filed by the defendants, and issues were settled on the pleadings, the only issue now material being No. 11—"whether the suit is maintainable under the terms of the mortgage-bond in suit?".

On that issue the Subordinate Judge said "I entertain no doubt that the suit is maintainable under the clear terms of the mortgage-bond (Exhibit 41) sued upon" and decreed the plaintiffs' claim.

An appeal from that decision to the High Court came before N. G. Chandavarkar and R. Knight, JJ., whose judgment was in the following terms:—

"The first question in this appeal is whether the suit lies. The point urged by the learned Counsel for the defendant is that upon a proper construction of the mortgage-deed there is no personal covenant on the part of the mortgagor to pay interest from year to year, and that therefore he is not entitled to bring

this suit. The Subordinate Judge has held against the defendant and passed a decree in favour of the plaintiffs. The mortgage-deed has been read out before us and having carefully considered the contents of it, we are of opinion that Mr. Robertson's contention must prevail. The terms of the deed are free from ambiguity. It starts by saying that the property covered by the mortgage-deed is hypothecated for the sum of Rs. 30,000 and interest, and that that sum shall be payable out of it, the said property. That is the dominant clause in the deed and, according to it, there is no personal obligation to pay interest annually.

"Then the deed goes on to provide for the manner in which interest shall be paid. As regards that the provision in the deed is as follows:—'We shall,' says the executant, 'take receipts from you on payment of interest from year to year in the manner provided above'. There again there is no covenant. It only means if interest is paid from year to year, receipts shall be taken. And a covenant should not be implied unless the language of the document is quite clear. See *James* v. *Cochrane*(1), where Parke B. says:—'According to the rule of law on this subject—and the whole case turns upon the application of that rule—no precise words are necessary to constitute a covenant; provided we are able to collect an agreement by the parties that a certain thing shall be done, that will be sufficient to enable us to say that a covenant is created. But we must be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done.' In the mortgage-deed before us there is no agreement by the mortgagors that they shall pay interest annually. All they say is that if they pay they shall take receipts for the payment—which is a different thing from a personal covenant.

"Then there is another passage in the document which supports the construction which Mr. Robertson has asked us to put upon the document. There the mortgagors say that should the property hypothecated prove insufficient to realise the amount of the principal and interest the mortgagors shall be personally liable for the deficit of the amount which may have to be realised. That shows that the question of personal liability was present to the minds of the parties, and that whenever they intended that a personal liability should be imposed, they used express and apt words to bring out their meaning. These words have not been used with reference to the clause as to the annual payment of interest. It is unnecessary to pursue other clauses, because they all go to support our conclusion."

The High Court, therefore, reversed the decision of the Subordinate Judge and dismissed the suit.

On this appeal which was heard *ex parte*,

De Gruyther K. C. and *Ross* for the appellants contended that the High Court had misconstrued the mortgage-deed of 21st

(1) (1852) 7 Exch. 171 at p. 177.

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July 1893, and had wrongly held that the suit was not maintainable. There was, it was submitted, an express personal agreement by the defendants to pay interest every year, and this was never denied by the defendants, who had merely contended that the personal liability could not be enforced under the mortgage-bond until the sale proceeds of the mortgaged property fell short of the amount due, and that the suit for interest on the personal covenant was premature. The provision for payment of compound interest showed that the interest became due and was payable every year, and the other portions of the mortgage-deed did not support the construction arrived at by the High Court. If it was considered that there was no express agreement to pay interest every year, such an agreement could at least have been implied from the terms of the deed. The High Court had overlooked the fact that the interest was payable partly in cash and partly in kind, and that there was nothing in the mortgage-deed to show that part of the interest (namely, that payable in kind) was to be paid every year, and payment of the rest of the interest (namely, the cash) was to be postponed for 40 years, as the High Court had held. The mortgage-deed, one made according to the practice prevailing in the mofussil and not by a professional lawyer, should have been construed not with reference to English decisions but in accordance with the real intentions of the parties as evidenced by the terms of the deed.

1911 JUNE 13TH:—The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—Their Lordships are of opinion that the judgment of the High Court is erroneous. The learned Judges must have been misled by some erroneous translation, because on a certified translation before their Lordships nothing can be clearer than that there is a covenant to pay interest from year to year.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the order on appeal reversed, and that the case should go back to the High Court so that the other issues may be dealt with.

As regards costs the appellants are entitled to them here and in the High Court. The costs in the lower Court will abide the event of the further hearing in the High Court.

Solicitors for the appellants : Messrs. *T. L. Wilson and Co.*

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

SIDICK HAJI HOOSEIN, APPELLANT AND DEFENDANT, *v.* BRUEL AND CO., RESPONDENTS AND PLAINTIFFS.*

1910. *September* 2.

Landlord and tenant—Sub-lessee—Avoidance of lease—Vacant possession—Holding over—Transfer of Property Act (IV of 1882), section 108.

The plaintiffs were lessees of a godown for one year from 1st April 1908, at a monthly rent. From 1st May 1908 they sublet it on the same terms for the remainder of their lease to the defendant who used it for storing bags of sugar. On 5th December the godown was partially destroyed by fire, and a quantity of sugar therein considerably damaged. The defendant's insurers came in to take charge of the salvage, but soon after sold the remains of the sugar to G. M., and the latter then took possession, and continued in possession, sorting the sugar until 16th February 1909. Meanwhile on 10th December the plaintiffs had written to the landlord advising him of the fire and of their termination of the lease in consequence. The landlord, however, insisted on their liability to pay rent until such time as vacant possession should be given to him. The defendant, in answer to a bill for rent, wrote to the plaintiffs to the effect that he had terminated his lease on account of the fire, and would not pay more than the proportionate rent for the first 5 days of December. As, however, vacant possession was not given until 16th February (on which day G. M. went out of possession) the plaintiffs sued the defendant for rent and for use and occupation.

Held, that the plaintiffs could not exercise their option to terminate the lease until they put the landlord into possession. If the avoidance of the lease under

* Appeal No. 10 of 1910. Suit No. 257 of 1909.