(1869) 01 CAL CK 0005

Calcutta High Court

Case No: None

Shah Makhanlal and Others		APPELLANT
	Vs	
Srikrishna Sing and Others		RESPONDENT

Date of Decision: Jan. 18, 1869

Judgement

1. This is an appeal in a mortgage suit instituted more than twenty years ago. The original plaintiffs, the mortgagors, named Sing, sued in the Court of the Sudder Ameen of Zilla Sarun, the representatives of the original mortgagees, named Lal, who were eminent bankers, having cootis in various parts of India, and also one Ramkrishna, the gomasta of the firm, to cancel on redemption three several instruments, viz., the mortgage deed, lease, and agreement named in the plaint, and which will be more particularly described. These instruments the plaintiffs alleged to constitute one mortgage security of the bankers, the Lal defendants. All the defendants asserted, however, as to two of these instruments, viz., the lease and the agreement, a different title and interest, conferring a separate interest as distinct from the bankers, on their gomasta, the last defendant. The lease bore date the 16th May 1837; it was for twenty years, and reserved a rent of sicca rupees 24,858 annas 10, payable to the Sings by the gomasta. The mortgage deed bore date the 5th June in the same year, and pledged the same property also for twenty years to the bankers, to secure a loan of sicca rupees 1,50,000 from them to the Sings. The interest reserved was 9 per cent. Ostensibly, the mortgagees were entitled to the rent alone, the surplus of which, after deducting the Government revenue, left a balance of rupees 13,500, exactly the sum calculable as interest on the loan at 9 per cent. Ramkrishna granted, as apparently a subsidiary arrangement, sub-leases to certain katkanadars, nominees of the mortgagors, at rents aggregating sicca rupees 35,067, and the mortgagors guaranteed to him those receipts of rent. Ostensibly, therefore, the several instruments evidenced a mortgage transaction, providing only for interest alone from the usufruct, leaving the principal debt to be paid otherwise in full, and a beneficial lease in the gomasta yielding an annual profit of rupees 10,200. All the defendants insisted that the

ostensible was also the real character of the instruments. The ikrarnama was executed by the mortgagors, the Sings, to the gomasta, on the 29th August, in the same year, as a security to cover certain losses incurred or anticipated from adverse claims, for the due payments of their rents by the sub-lessees, the katkanadars, and for a future advance of sicca rupees 7,000 bearing an interest of 12 per cent.

2. The plaintiffs sought also to recover possession, alleging the mortgagees, the Lal defendants, whom they treated as mortgagees in possession, to be satisfied from the usufruct, and further claimed as mesne profits a small alleged surplus from the same source.

3. This claim, then, of the mortgagors to redeem before the twenty years were past, was denied in respect of all that the lease covered, which was the whole that the mortgage deed included.

4. The suit further raised these questions at what rate of interest, whether 9 per cent, or a higher rate, the plaintiffs were entitled at any time to redeem; whether the loan was at usurious interest; and whether the several instruments were a device or means within section 9, Regulation XV of 1793, to conceal usury, and so evade the usury laws.

5. The suit, therefore, involved issues of title, and not simply one of payment on an admitted title to redeem under a contract, raising no question as to the terms of redemption.

6. The suit was heard in the Principal Sudder Ameen''s Court, which decided in the defendants'' favour on all the issues. From that decision there was an appeal to the Sudder Dewanny Adawlut, which decided that the three instruments formed one mortgage security, as alleged in the plaint, and were a device to conceal usury; that the contract was usurious, but that as the plaint was for redemption, the mortgage was redeemable on payment of the principal and 9 per cent, the interest expressed to be payable in the mortgage deed; and the Court, reversing the finding, sent the case back to be tried in the Court below on the enquiries which it directed, and which were limited in effect to satisfaction of the mortgage at the date of suit. The cause was then transferred from the Principal Sudder Ameen''s Court to that of the Zilla Judge, who, before he proceeded to try the questions submitted to him, called for the accounts of the gross receipts and disbursements directed by the Regulation XV of 1793, section 2. The defendants, who subsequently renewed the dispute as to the unity of the title, declared themselves unable to give the accounts demanded of them. The Judge then deputed an Ameen to take an account of, and report as to the receipts. The Ameen reported and found that the defendants were overpaid, to a much larger amount than the plaintiffs'' own case declared them to be. The Court rejected that report, went itself into the enquiry, found the plaintiffs still indebted on the account, and dismissed the suit. From that decision there was again an appeal to the Sudder Court, which reversed the decision, directed that the accounts should be

produced, and further directed certain additional enquiries to be made, the precise character of which need not here be stated. The cause was again heard after much preliminary litigation as to the nature of the accounts required, and the proper mode of verifying them.

7. The Court again decreed in favour of the defendants, declaring a considerable sum, exceeding rupees 50,000, to be still due; and on that ground dismissed the plaintiffs'' suit with costs, without any declaration as to title. From this decision the plaintiffs, and also the defendants, appealed to the Sudder, the defendants raising anew their contention as to the rate of interest, that 12 per cent, should be declared to be the due rate. The Sudder (Loch and Steer, J.J.) decided the case in favour of the plaintiffs, and decreed, on 22nd April 1861, their claim in full, except as to the wasilat, and from that last decision the present appeal is brought.

8. The accounts received in the Court below were declared by the Sudder Court not to be the proper accounts, and that Court considered itself entitled to presume from the non-production of the right accounts, that they, if produced, would show the mortgage satisfied. The statement of the rental and the accounts annexed to the plaint formed the basis of the decision, the correctness of which as to the amount of income in the time of the mortgagor''s possession they considered to be prima facie established. The accounts actually rendered were the banking books of the defendants'' banking firm, containing a statement of their receipts and the accounts of the gomasta of the bankers, who was in truth the person, as manager, best acquainted with the transactions, and a trustee, as it was found in effect, for the mortgagees. He was examined under a commission, and deposed to the correctness of the accounts which he gave in. The existence of any other accounts did not appear.

9. As the Regulation required the mortgagees to swear to the accounts, the Court considered the attestation by the gomasta insufficient. On this last appeal to the Sudder, the question of the rate of interest was again raised by the defendants in their objection to the appeal; the Judges said they had already decided the question, and again declared that they abided by their decision, thinking it correct. They expressed no opinion whether they were excluded by their procedure from reconsidering the matter on a new appeal to them. It is not at all material to the decision of this case to determine whether they could or could not have entered into that question in any way, had they thought their previous opinion on the point erroneous. Their Lordships think that the question as to the interest is open on this appeal, though the plaintiffs might have appealed, and did not appeal from the interlocutory decree on the point. This point is governed and settled by the cases of Alexander John Forbes vs. Ameeroonissa Begum , and Maharaja Moheshur Sing v. The Bengal Government, 7 Moore, I.A., 283.

10. The first question to be determined by their Lordships is, whether the decision of the Sudder Dewanny Adawlut, that the interest must be calculated at 9 per cent

only, is correct. It is clear that if the mortgagees had been suing the mortgagor on the mortgage deed for the debt, they could have recovered no higher rate of interest than 9 per cent, the contract being in writing, and incapable of being varied by parol evidence; but this is by no means decisive of the question; for, supposing that the extra profits on the several engagements forming one mortgage security had amounted only in the whole to 3 per cent making up 12 per cent, only in all, precisely the same consequence would have ensued; the reserved interest would have been correctly viewed as constituting part only of the profit, and as such would have been all that the parties stipulated for as to that part of the transaction, but it would not have measured the stipulated return for the loan annually. The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts. The Law, however, furnishes exceptions to its own salutary protection; one of which is, when one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded not so much on any positive law as on the broad and universally applicable principles of justice. The case of Alexander John Forbes vs. Ameeroonissa Begum , furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships:--"The respondent cannot both repudiate the obligations of the lease, and claim the benefit of it." Unless, therefore, some positive law has said that in cases similar to the present, the written engagement, though not extending to the whole profit stipulated, must be adhered to against the defendant, though the plaintiff may go beyond it to show the full extent of the profit, and so to be relieved from the consequences of his actual contract, their Lordships must hold that the bargain disclosed should be performed so far as the law allows; in other words, that 12 percent was, in this instance, the interest.

11. The decision of the Judges of the Sudder Dewanny Adawlut on this point was founded not on any grounds of equity, but upon their construction of the law. They considered that they were bound, by the terms of the 5th section of Regulation XV of 1793, to give no more than the interest stipulated, and that 9 per cent, was that rate of interest, thus in reality begging the question in dispute. Their Lordships have, therefore, to consider the real meaning of the words used in that section, which meaning will be best ascertained by an examination of other parts of that Regulation. In India, amongst the Hindus, the restriction as to interest by their law was, that interest stopped when it equaled the loan. The interference with the rate

of interest is, therefore, a thing of positive law, and cannot be extended beyond the provisions of the Regulation. By the 2nd section of the Regulation in question, a minimum rate of interest, and that a high one much in excess of 12 per cent, was directed to be decreed; and by the third the maximum rate of interest was reduced to 12 per cent in the case only of debts exceeding 100 sicca rupees. The rates prescribed by the Regulation in the several cases enumerated were fixed rates, constituting both a maximum and minimum in the cases aforesaid, which were limited to contracts between, and prior to, named dates. Then, by the 4th section, in causes of action arising after the 1st January 1793, the Courts were not to decree any interest on any sum whatever above the rate of 12 per cent, per annum. From that time this was the limit beyond which no claim to interest could be enforced in respect of contracts entered into after that date; and it practically governed other cases where interest could be decreed, irrespective of contract. But inasmuch as the words of the earlier sections standing alone might seem to prescribe a rate of interest, irrespective of agreement, and so lead to misapprehension of the meaning of the law, the framers of it, by the 5th section, declared further, that if a lower rate of interest than any of the rates authorized to be awarded shall have been stipulated between the parties, no higher rate of interest than the rate so stipulated is to be decreed. This plainly relates to the real agreement between the parties constituting an actual legal stipulation; for it constitutes a limitation of the 4th section, as well as of the others. It does not extend to the cases comprised within the 9th section, where a device or means is used to disguise the real contract as to interest, for the provisions are inconsistent. The language of the 5th section would be violated by a construction of the word "stipulated," which would confine it to "expressed." Such a construction would be an extension of a penal enactment to a case not within its language and obvious objects, and that where another section did provide for the case before the Court.

12. The 6th, 7th, and 9th sections apply in terms to remedies, to suits brought to enforce, not to suits brought for relief against a contract. To bring a case within the 8th section, the excess must be specified in the contract itself. The 9th section does not declare the contract itself void, nor direct any pledge to be returned, without redemption. The 10th section furnishes an argument that such was not the design. But even if this did not appear, a penal law, and especially one of so peculiar a character as that contained in the 9th section of this Regulation, is not one to be extended by construction. This section is one in poenam against the concealment of the usury; for the open violation of the Regulation entails, u/s 8, only a forfeiture of interest. If the 9th section were so extended by construction as to invalidate the contract itself and make it, and the conveyance also obtained under it, null and void, then, inasmuch as there are no saving words, an innocent purchaser without notice from the mortgagee, by assignment of the pledge, would be unable to retain it, even for the just debt and legal interest. Their Lordships, therefore, think that the only section of the Regulation at all applicable to the present suit brought by a

plaintiff to set aside his contract, and have restitution of the pledge on terms of redemption, is the 10th section. If any case were needed to enforce so plain a rule (which, however, has been questioned) that of Eshen Chunder Singh v. Shama Churn Bhutto, 11 Moore, I.A. 7, emphatically points out, in the language of Lord Westbury, "the absolute necessity that the determinations in a cause should be founded on a case either to be found in the pleadings, or involved in or consistent with the case thereby made." The present suit is one for redemption, not for declaring a forfeiture, and must be decided according to the rules applicable to the former suit. If the transaction were simply void, and no estate at all passed, it is obvious that the remedy to recover the land would be a possessory suit against which limitation would run from the moment of entry. It cannot be treated as a voidable or redeemable estate between mortgagor and mortgagee for one purpose, viz., to escape the limitation law, and as a void estate for another. If the estate in the lands created by the lease can be determined before the expiration of the twenty years that can only be effected by coming to the Court for equitable relief, and submitting to the usual terms on which such relief is granted. What, then, are these terms? The Court will not, in the interests of justice, permit inconsistency and untruth of statement; will not permit a plaintiff to say, I promised to give the defendant 14 per cent on his loan to me, and seek relief against him on that allegation; and permit him also the next instant to say the contract is expressed for 9 per cent, and I will not tie my opponent down to that term, that lower rate must be deemed to have been stipulated, and so to form the measure of his right to interest. The reply to this will be, you have told us what the real bargain was, and on this statement you have made your application for relief, which you can obtain only on equitable grounds. Their Lordships find in the Regulations no positive law forbidding the application of these principles of justice to the case.

13. The 10th section rather leads to a contrary conclusion, viz., that in a case circumstanced like the present, the mortgagee may retain his pledge until he has received out of it his debt with interest at 12 per cent. At the time when this Regulation was passed, the receipt of profits in lieu of interest under a simple usufruct mortgage was common, as indeed appears by the introductory words of the cause. As to mortgages executed before the 28th March 1780, the usufruct might be allowed even after the Regulation, in lieu of interest up to that date. Then after that date, that dividing point of time, and subsequently to it, the character of these mortgages suffered a change. The mortgagee''s possession, instead of enduring by title for the stipulated time, was made liable to abridgment by satisfaction from the usufruct, and a claim to interest arose in some cases where it did not exist before. The perception of the profits in many cases did not constitute receipt of interest, but was in lieu of any. Then, as to all usufructuary mortgages to be made after the dividing time which was before the Regulation, it makes also provision and subjects alike, all the enumerated mortgages, to cancellation and redemption whenever the principal sum "with the simple interest due upon it," shall

have been realized from the usufruct of the property subsequent to the 28th day of March 1780, or otherwise liquidated by the mortgagor it applies then, to all alike, though the circumstances of them all were not originally similar, subjects them to one provision, and imposes interest, in some cases, where there was no contract for it before. This section having so provided, drops designedly the words "stipulated" and "specified" which would have been inappropriate in many of the cases, and uses, in more correct language, this expression-- "the simple interest due upon it." This simple interest would, of course, in all cases where no interest was named, be 12 per cent; but where a higher rate was named against which the usufruct was to be a set-off, that is, a receipt "in lieu" of it, the reduced rate would be 12 per cent, and all interest alike would be "due" by force of the enactment even where interest did not exist before; therefore, as this is the case of an usufructuary mortgage, by means of which a profit higher than the return of 12 per cent was to be made, and as relief is sought, viz., to have the pledge restored as cancelled or redeemed by satisfaction of the usufruct, the clause which is most closely applicable to the claim is the 10th, the terms of which are large enough to embrace, and were designed, in fact, to embrace, some cases where the law itself made the interest "due." The Regulation, then, rather seems to favour than prohibit the restoration of the pledge, on the Court terms, that is on reduced terms of interest imposed by the law. The real transaction appearing, and no prohibitory law intervening, the Court is left free to do justice in the particular case, and if the spirit of the 10th section regulate the case, it will sanction a redemption at the higher rate, allowing the actual contract so far as the law allows it. For the above reasons, their Lordships think the interest should have been calculated at the higher rate of 12 per cent.

14. This view of the case would suffice to show on the plaintiffs'' own estimate that the decree appealed from cannot be maintained, since the allowance of 12 per cent would, on that account, annexed to the plaint, show that the mortgage was not fully satisfied at the date of the institution of the suit. Their Lordships, however, must proceed to consider the other objections urged to the decree, and to view the conduct of the parties through this long protracted litigation with a view to their decision on the subject of costs.

15. The suit was brought to establish the title to redeem, for cancellation of the instruments, for possession of the lands, and payment of a small estimated surplus. It lay on the plaintiffs to show that the mortgagees were paid in full, out of their receipts. It was not also a suit to make the mortgagees charge-able for non-receipts of profits, which they might have received with common care and attention. A mortgagee is not an assurer of the continuation of the same rate of profit which his mortgagor was able to raise. Much depends, in India, on personal qualities. The very change of management and possession may cause a falling off of receipts. Therefore an estimate of a preceding rental does not suffice to show actual receipts, yet it is on this fallacious estimate at the outset, that the calculation of the plaintiffs, which they annexed to their plaint proceeds. Again, the plaintiffs make no deduction

for those parts of the pledged property which turned out to be subject to prior charges, and the calculation of interest proceeded also on a wrong basis. Had these defects, apparent on the face of the plaint, been duly dealt with at the inception of the case, this long litigation might have been, if not ended, limited at least at an earlier stage. It is, on the other hand, to be remembered that the plaintiffs claimed in their suit to have the character of the mortgage itself ascertained and decreed. In this they have succeeded against a long, vain, and unfounded opposition, for the case of the defendants on this part of the case, when closely investigated, is found inconsistent. It is not credible that the bankers would take, for so large a loan, a security which, on their present statement, has left them always losers, even of some part of the interest. The property waft in the neighbourhood; the gomasta was a man of business not likely to err so greatly in the valuation of the pledge: therefore to this part of the claim a groundless defence was made, which has failed, and the suit has established a very important right in the plaintiffs'' favour, though they have proved to be wrong in their estimates of the receipts and the rate of interest. The conduct of the mortgagees in not giving in the accounts at an earlier stage may be ascribed to the nature of their defence, and in no greater degree exposes them, than that defence itself does, to suspicion. If they meant to insist on that right, of course they would not have prepared and kept their account on an inconsistent principle. A great part, therefore, of the obstruction on this subject must be ascribed to this, that they viewed the transaction in its actual, whilst their opponents and the Court viewed it in its legal, aspect. The case does not afford room for supposing that any extortionate interest was in view though interest exceeding the legal rate has been stipulated for. The mortgagees were bankers, traders probably, realizing in their business a profit beyond the legal rate of interest, and they may have meant no more than to realize a profit proportionate to the risk, in the calculation of which the danger of loss by litigation cannot be excluded.

16. The judgment now appealed from mainly proceeds on the non-production of the right accounts under Regulation XV of 1793. Their Lordships incline to think that provision must, as regards this suit, be taken to be still in force and un-repealed by Act XXVIII of 1855. It is unnecessary to decide the point, as their Lordships think, that assuming it to be in full force, it has received in the judgment under review too strict an interpretation. Assuming it to be in force, what was the duty which it imposed on the appellants? The duty to which they were bound by law, in the character ascribed to them by the decree, which was not questioned by the appellants on this point, was to keep an account of gross receipts from the property mortgaged, and also the expenses of management and preservation. Some difficulties might attend a very rigid compliance with this Regulation. Their Lordships desire to enforce by everything which may fall from them on the subject, the duty as well as the policy and prudence of keeping as full, complete, and plain an account of the transactions attending the management and receipts of an estate mortgaged as the nature of the case will admit. It is obvious, however, that the

language of the section which applies to the common case must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession. The gross receipts must be such as the mortgagor himself, previous to the mortgage, would have been entitled to, and if he could not, by reason of an intervening lease, call for the account of the collections, neither can his mortgagee; and also, if at the time of the mortgage, a valid engagement, not designed to exclude accounting, is made by common consent, qualifying the nature of the usufructuary possession, the account of the receipts must be subject to that modification. The terms of the law are evidently not inflexible terms; and in like manner must be construed the provision as to the attestation of the truth of the accounts, which provision must necessarily be flexible like the former, for the mortgagee is to verify only his gross receipts and his expenditure, not the rents nor the extent of arrears, nor the causes of such arrears; he is not, in fact, directed then to make out and verify such an account as might be established against him in a hostile suit, but only his gross receipts and his expenditure. The common rule, qui facit per alium facit per se, would apply to him. What is done by his agent is done by himself, and the accounts of the property managed by the agent, though prepared by the agent, are the principal''s accounts. He, though by delegation, must deliver in the accounts, and he must, in some mode, swear or depose that they are true and authentic must it necessarily be by his own personal oath in all cases? How can he do that if he knows nothing at all about them? He may have no belief, and may even suspect them to be false; for he may suppose himself to have been deceived by his agent. Can the Legislature seriously be supposed to have contemplated anything so immoral as that a man should swear positively to knowledge of that of which he has and can have no personal knowledge? If it be urged that he may swear to his knowledge and belief, still that rational permission is a modification and expansion of the terms of the law. The words are without any exception, and in terms apply to women, infants, lunatics, persons out of the country, and others managing necessarily remote possessions by agents whom they must employ, and in whom they may confide. Can the Indian Legislature, which recognized gomastas by legislation, be supposed ignorant of their large authority and responsibility? And can it have resolved to make this direction to take an oath imperatively obligatory on every mortgagee alike in every conceivable case? Their Lordships think otherwise. They think that the language which, unlike other provisions of the earlier Regulations, is curt, and applied to the more common cases, must, to preserve even the spirit of the enactment itself, be construed reasonably, as admitting, in case of necessity, of some delegation also in the person deputed to perform the duty of attesting the accounts. If the general manager who did all, and knows all, with whom the mortgagors, with that knowledge, contracted, whose name is used, whose accounts in one sense they are, and who, far more than mere representatives, knowing nothing of their own knowledge of the transactions, satisfies the spirit of the law, swears to the truth of them, it is such a reasonable compliance with the spirit of the law, at least that its

performance, in a case circumstanced like the present, by a substitute, furnishes no ground whatever for suspecting malpractice or designed evasion of the law, and with that alone their Lordships are concerned in this case, since the mere mode of the verification has no other importance in this case, than as it raises a case of suspicion against the accounts themselves. The mere mode of their verification under the circumstances of this case does not raise, in their Lordships'' minds, any distrust. The contents of the accounts themselves, however, furnish more ground for doubting their accuracy. They show the interest alone not covered by the receipts. The bankers and their gomasta were experienced men of business. The loan is large. The property was not likely to be unknown to the lenders as to its general productiveness.

17. No change of circumstances accounting for so great a decline is disclosed, and the decision below of the Judge of the Zilla Court does not justify the conclusion that the whole debt, and some arrears of interest, still remain unsatisfied. Some explanation of this may be afforded by the circumstance that the mortgagees long insisted on a state of accountability very different from that adjudged; and there does appear to their Lordships reason for thinking the accounts rendered to be so far unsatisfactory as to have justified the Court had it directed a further enquiry; that is, supposing the plaintiffs'' prospect of success in his present suit to have been such as might have been prejudiced by the omission to direct that further enquiry.

18. Their Lordships, however, think that the Sudder Court was not justified in inferring from the omission to render satisfactory accounts, under the circumstances of this case, that the mortgage had been satisfied when the suit was commenced. Had the state of the accounts, and the dealing as to them, raised a case of presumptive evidence of payment, still the conclusions from the evidence, in this case, cannot be supported, for the calculation of the Court is not formed on a correct basis, either as to the interest or as to the property; it makes no deduction for losses, which the evidence in the cause discloses, arising from the partial loss of the property pledged, and some litigation which ensued thereon; it excludes also the evidence which the suit and the enquiries and proceedings subsequently to the interlocutory decree afford, as does also the failure of the arrangement, through the instrumentality of the katkanadars, that the collections never really equaled the gross estimated rental. This evidence, so far as it reached, destroyed, pro tanto, the presumptive evidence of the correctness of the estimated receipts. Presumptions even in odium spoliator''s have known reasonable limits. They must not be conjectures, nor grounded on data which the evidence itself shows to be inexact. Had this case been one in which the whole account between these parties could be taken, their Lordships would have remanded the case for further hearing, or, had the plaintiffs'' own case disclosed a probability, even that a further hearing could decide it in their favour, their Lordships, under its peculiar circumstances, would have been disposed to adopt the same course under some restrictive direction; but there is not the slightest ground for supposing the income of the estate larger than

the plaintiffs'' own calculation; and even assuming that to be incapable of reduction, the allowance of 12 per cent involves the dismissal of his plaint. In general, the dismissal of a suit should carry with it its consequence of liability for the costs, and this case is one brought against mortgagees. But, in the opinion of their Lordships, the present suit affords several substantial grounds for a departure from that rule. The suit was brought, not simply for possession, on an allegation of satisfaction from the usufruct, but to establish the true relation between the mortgagors and mortgagees, the true nature of the case, the disguised usury, and the disputed unity in one mortgage title of the three several instruments before explained. So far it was successful, and it, therefore, cannot be ascribed to a litigious, vexatious spirit; it has established points most important to the future true adjustment of the mortgage accounts, and cannot be said to have been unproductive of future benefit to all concerned. And in respect of the costs of the proceedings had in the Courts below subsequently to the interlocutory decree of the 14th of July 1842, their Lordships have to observe that those proceedings would have been unnecessary had the appellants then appealed against the Sudder Court''s decision as to the rate of interest, and further that the unsatisfactory result of the enquiries directed by that decree, and the failure of the Courts below to ascertain by evidence the actual amount of the gross collections, are, in some measure, due to the unsatisfactory character of the accounts rendered by the appellants. The decree of the Judge of the Zilla Court simply dismisses the plaintiffs'' suit, which, in some important parts of it, had succeeded. That judgment, therefore, cannot be restored without alteration. Errors have been committed in this suit, in a nearly equal degree, by both litigants. Their Lordships think that the decree of the Sudder Court should be reversed, except so far as it reverses the decision of the Court below, and that it should be declared that the mortgage, lease, and agreement mentioned in the plaint, and there alleged by the plaintiffs to constitute one mortgage security, did constitute that one security; that the mortgagees were the Lal defendants, and the defendant, Ramkrishna, was only their agent, and had no interest in the lease or agreement distinct from that of the mortgagees, who are accountable, as mortgagees in possession, to the plaintiffs in this suit for all moneys received by them in respect of the rents and profits of the mortgaged property by virtue of the said lease. That the three instruments were entered into with a view to evade the usury laws by a device or means within the meaning of the 9th section of Regulation XV of 1793; and that the plaintiffs were and are entitled to redeem at any time, though before the expiration of the twenty years'' term created by the lease, on payment or satisfaction of all that may be due on the mortgage securities for principal money, interest and costs, such interest to be calculated at 12 per cent; but that, it appearing that the plaintiffs have failed to prove that the mortgage debt, with interest and costs, had been satisfied at the time of the institution of the suit, the said suit should be dismissed without costs, and that the decree of the Court below of dismissal of the plaintiffs'' suit should be restored, so far only as to include that order of dismissal with the declaration and alteration above stated; and that with a

view to the due enforcement of the order of Her Majesty in Council, the High Court should be directed to remand the cause to the Court below, and to order the decree of dismissal simply to be restored with the above declaration and alteration. And their Lordships will further advise Her Majesty that each party should pay their own costs of the appeal to the Sudder Court hereby partly reversed; and that any costs of such last appeal as may have been decreed and paid, and which are inconsistent with such order of Her Majesty, should be refunded, or otherwise dealt with as justice may require. Their Lordships think that the appellants are entitled to the ordinary costs of this appeal; but they are of opinion that those costs ought not to have been swollen by the severance, in defence of the four persons representing the original mortgagees, and the presentation of two distinct appeals. They will direct the Registrar to tax these costs accordingly.