

(1890) 03 CAL CK 0003

Calcutta High Court

Case No: None

Lall Behary Dutt

APPELLANT

Vs

Thacomoney Dassee

Kanaye Lall Khan Vs Anund Lall

RESPONDENT

Dass

Date of Decision: March 13, 1890

Citation: (1896) ILR (Cal) 899

Hon'ble Judges: Wilson, J; Sale, J

Bench: Division Bench

Judgement

Sale, J.

This is an application by the defendant for an order that, having regard to the law of damdupat, the plaintiff is not entitled to realize and receive more on account of principal and interest under the decree in this suit, dated the 23rd July 1883, than double the amount of the principal sum therein mentioned.

2. It appears that, on the 30th May 1879, the- defendant's husband (since deceased) executed a mortgage in favour of the plaintiff to secure the principal sum of Rs. 12,000 and interest thereon at the rate of 15 per cent, per annum, the security being the mortgagor's undivided one-tenth share in properties specifically mentioned in the mortgage which formed part of a joint family estate.

3. A suit to partition the joint estate was instituted on the 18th of February 1880. In that suit a decree for partition was made on the 2nd of April 1881, and by an order, dated the 26th of May 1881, the Receiver of this Court was appointed Receiver of the whole joint estate. On the 16th March 1882, the plaintiff instituted the present suit, and, on the 23rd July 1883, obtained the usual mortgage decree, which directed the Registrar to take an account of what was due to the plaintiff on his mortgage, the interest to be calculated on the principal sum being at the rate mentioned in the mortgage during the period allowed for redemption, namely, six months from the date of the decree; and it was provided that, on the expiry of that period, the

interest then due should be added to the principal sum, and that thereafter interest should be calculated on the aggregate amount at the rate of 6 per cent, per annum; and it was further provided that, in default of payment of the aggregate amount, the mortgaged premises, or such other property as might in the partition suit be allotted to the defendant as the representative of the mortgagor, should be sold.

4. On the 20th of November 1883, the Registrar made his report, whereby he found that at the expiry of the period of six months, that is to say, on the 22nd January 1884, there would be due to the plaintiff under the decree Rs. 12,000 for principal and Rs. 11,534-0-3 for interest, making in the aggregate Rs. 23,534-0-3.

5. At this period the rule of damdupat was not applicable, the interest found due being less than the principal sum. No exceptions were taken to the report, which became confirmed by effluxion of time, and though default was made in payment of the aggregate amount due under the mortgage, no immediate steps were taken to carry out the direction for the sale of the mortgaged premises.

6. On the 6th of December 1894, the plaintiff, on notice to the several parties in the partition suit, obtained an order in this suit, whereby the Receiver was directed to sell so much of the Immovable properties allotted to the defendant in the partition proceedings as would be sufficient to provide for certain specific payments directed by the order, and he was further directed, after making such payments, to apply the balance of the sale proceeds towards payment to the plaintiff of the amount payable to him under the decree made in this suit.

7. In pursuance of this order some of the properties allotted to the defendant have been sold by the Receiver, and the sum of Rs. 55,000 has been realized as the sale proceeds. "Out of this sum the plaintiff now claims to be paid Rs. 23,534-0-3 as the principal sum due under the mortgage decree and the report made thereunder, together with interest thereon at the rate of 6 per cent.

8. The defendant contends that the rule of damdupat applies, and that by operation of that rule the plaintiff cannot receive under his mortgage decree an amount of interest larger than the principal sum secured by the mortgage.

9. The plaintiff's contention, on the other hand, is, that the report having become final and binding between the parties, the aggregate amount shown in the report is to be regarded as the judgment debt, and that he is entitled to interest thereon at 6 per cent, in terms of the decree.

10. The question, whether, under these circumstances, the rule of damdupat can be held to apply so as to prevent the calculation of interest at the decretal rate on the aggregate amount found due by the report, has been considered and determined in this Court by Wilson, J., on two occasions.

11. In a mortgage suit, Buggoban Chunder Roy Chowdhry v. Pran Coomaree Dassee (See post, page 906), a decree was made, dated the 1st of March 1880, for an

account and sale, with the usual directions for the allowance of interest. The Registrar's report finding what was due for principal and interest is dated the 24th February 1881.

12. By an order, dated the 4th of September 1888, it was referred to the Registrar to take an account subsequent to the account already taken. The Registrar's second report is dated 17th June 1889.

13. It would seem that in taking the subsequent account, the whole account was treated as open, and the rule of damdupat was applied.

14. It does not appear that the question of the application of the rule of damdupat was discussed or questioned before the Registrar, but exceptions were taken to the report which were argued on the 10th of February 1890, and in the result the learned Judge held that interest ought to be calculated on the aggregate amount shown in the report, and the report was varied by the allowance of interest which had been disallowed under the rule of damdupat. So also in the case of *Kanaye Lall Khan v. Anund Lall Dass*¹, which was also a mortgage suit, it appears that several years after the Registrar had made his report finding what was due for principal and interest, a fresh reference was made to him to take an account of what was then due. In the course of taking the further account, the question of the application of the rule of damdupat was raised and discussed before the Registrar by Counsel who appeared for the respective parties, and in his report dated the 10th of January 1890, which fully sets out the facts, the Registrar states as follows:

There can be no doubt that the decree came into full operation on the confirmation of the former report, and was final in all respects, except as to the sale of the mortgaged properties. IF this view is correct, it follows that the rule of damdupat must be treated as inapplicable to the present case.

15. Exceptions were taken to this report, and it was contended that the Registrar was wrong in treating the original report as final, so as to exclude the operation of the rule of damdupat. The learned Judge, however, held that the Registrar was right in refusing to apply the rule of damdupat (see the Court Minutes on the 30th March 1890).

16. In these cases it was in effect decided that a decree for an account in a mortgage suit, containing the usual directions as to the calculation of interest, is not final until after the report is made and confirmed; that there--after the original decree and the report taken together operate as a final decree; and that if the rule of damdupat was not then applicable, or, if applicable, was-not applied, it cannot afterwards be applied so as to prevent calculation of interest on the aggregate amount found due by the report in accordance with the directions contained in the decree.

17. The principle deducible from these cases is not in conflict with my decision in the case of *Ram Kanye Audhicary v. Catty Churn Dey* ILR 21 Cal. 840.

18. The ruling in that case is that when, in taking an account directed by a mortgage decree, the rule of damdupat has been rightly applied in disallowing interest in excess of the principal sum, such application of the rule before the decree has become final, operates to prevent effect being given to the direction contained in the decree for the calculation of further interest on the aggregate amount certified to be due by the report.

19. The cases decided by Wilson, J., show that when the rule of damdupat is not applicable at the time the decree becomes final, the direction that the aggregate amount shown to be due by the report is to carry interest at 6 per cent. must be given effect to. Applying, therefore, the principle laid down by Wilson, J., I must hold that the defendant is not entitled to the order asked for, and that this application must be refused with costs.