

**(1919) 01 CAL CK 0045**

**Calcutta High Court**

**Case No:** None

Bhutnath Bose

APPELLANT

Vs

Kali Prasad Patra

RESPONDENT

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**Date of Decision:** Jan. 20, 1919

**Citation:** AIR 1919 Cal 520 : 50 Ind. Cas. 71

**Hon'ble Judges:** Teunon, J; Greaves, J

**Bench:** Division Bench

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### **Judgement**

1. This is an appeal by the plaintiff against a decision of the Additional District Judge of the 24-Perganaa affirming a decision of the Subordinate Judge. The plaintiff sued upon a mortgage dated the 14th Magh 1305.
2. Three questions arise on the appeal, first, whether the plaintiff's suit is barred by limitation, secondly, whether there was in fact consideration for the mortgage, and thirdly, a point which has not been dealt with by either of the lower Courts, whether the provision for interest at the rate of 75 per cent. contained in the mortgage-bond is an unconscionable bargain.
3. With regard to the first point, both the lower Courts have held that upon the construction of the bond the plaintiff's claim is barred by limitation. The bond provides for repayment of the principal and interest by the month of Chaitra 1305, but there is this additional provision, namely, that if the mortgagor fails to repay the amount upon this date he is to give to the mortgagee the produce of the mortgaged property for three years, namely, for 1306, 1307 and 1308. There is a further provision that the mortgagor will not thresh the produce without the permission of the mortgagee, and that if he does so the mortgagee should realize the principal and interest in the month of Magh 1308. Now as already stated, both the Courts have held that upon the construction of the bond the plaintiff's claim is barred by limitation, as his cause of action, they say, arose in the month of Chaitra 1305.. We do not think that this is so upon a true construction of the bond, for we think the proviso already referred to with regard to the question of produce extends the time

for payment until the year 1303, and that this suit is brought within time and that no question of limitation arises. If the plaintiff had sued in the year 1306, default having been made in payment of the principal, we do not think that there would have been any answer to the contention of the defendant that he was entitled to give the produce for the years 1308, 1307 and 1308, and that before 1308 no cause of action arose in the plaintiff for the enforcement of the money due upon the mortgage bond.

4. The respondent referred in support of his contention to a case reported as Sitab Chand Nahar v. Hyder Malla 24 C. 281 : 1 C.W.N. 229 : 12 Ind. Dec. (N.S.) 854, which refers to an English case, Beeves v. Butcher (1843) 4 Q.B. 509 : 60 L.J.Q.B. 619 : 65 L.T. 329 : 39 W.R. 626, and to a case which is cited in that report, Hemp v. Garland (1843) 2 Q.B. 519 : 3 G. & D. 402 12 L.J.Q.B. 134 : 7 Jur. 302 : 114 E.R. 994 : 62 R.R. 423. The decision in Sitab Chand Nahar v. Hyder Malla 24 C. 281 : 1 C.W.N. 229 : 12 Ind. Dec. (N.S.) 854 and the decision in Beeves v. Butcher (1843) 4 Q.B. 509 : 60 L.J.Q.B. 619 : 65 L.T. 329 : 39 W.R. 626 were decisions with regard to mortgages in which the principal was not repayable for a term of years and where there was a superadded proviso that if there was default in payment of interest, then the money should become due at once and the decision in both these cases was that limitation ran from the time when the money first became due by reason of the default in payment of interest which made the whole of the principal sum immediately due. The considerations that applied in those cases are not applicable to the present case, having regard to the construction of the mortgage-bond already stated. The result is, therefore, that we think that with regard to the first point, namely, the question of limitation, both the Courts below arrived at a wrong conclusion and that the plaintiff's claim is not barred by limitation.

5. With regard to the second point, that is to say, whether the passing of consideration is established, the mortgage-band admits the receipt of the consideration money of Rs. 300, but the plaintiff was not content to rest there and stated in cross-examination that the money did not pass upon the date that the bond was executed, but that it passed two days before. He also called a witness Ram Chandra to support the passing of the consideration, but Ram Chandra has not been believed by the Subordinate Judge. Now it is urged on this point on behalf of the appellant that the learned Additional District Judge was quite right in holding that by virtue of the provisions contained in the bond the onus of showing that consideration did not pass lay upon the defendant and that he has not discharged that onus. But in the present case the plaintiff did not rest upon the admission of the defendant in the bond but elected to give evidence with regard to the passing of the consideration. Different considerations, therefore, apply, and we think that the Additional District Judge, instead of merely dismissing the evidence, as he has done, with a bare statement that the onus is upon the defendant, should in the circumstances have gone into the evidence and arrived at a finding of fact as to whether or not the consideration money passed.

6. Accordingly the appeal succeeds to this extent that we remand the case to the Additional District Judge for a finding upon the question as to whether or not the consideration money for the mortgage in fact passed and he will also arrive at a finding whether the rate of interest charged in the bond is unconscionable and should, therefore, be reduced. The learned District Judge, when he has arrived at findings on those issues, will finally dispose of the case. If it is necessary with regard to the question of the rate of interest to take farther evidence the learned Judge will proceed in the manner indicated in Order XLI, Rules 27 and 28, Civil Procedure Code. It remains to refer to a case upon the second point to which we were referred in argument, namely, *Lala Lakmi Chand v. Syid Haidar Shah 4 C.W.N. 82 (P.C.)*. Lord Hobhouse in delivering the judgment of the Board there states that if it is clear upon the evidence that the statement in the bond with regard to the passing of the consideration is fictitious, the mortgagee, to succeed, is bound to prove in some other way that he made the advance which he alleges.

7. Costs will be costs in the case.