Privy Council Appeal No. 46 *of* 1920.

Rai Bahadur Seth Nemichand, since deceased (now represented by Seth Teekam Chand) - - - - - - - *Appellant*

v.

Seth Radha Kishen, since deceased, and others - - - *Respondents*

FROM

THE COURT OF THE CHIEF COMMISSIONER, AJMER-MERWARA.

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH, 1921.

Present at the Hearing:

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

This is a suit upon a mortgage. The mortgage was of date the 12th December, 1890, for Rs. 30,000, with interest at 10 annas per cent. per mensem, executed by three persons carrying on business as bankers in favour of the plaintiff. On the back of the mortgage deed there are certain endorsations signed by the debtor, who was the manager of the firm. These show that up to the 11th August, 1893, there had been paid Rs. 11,334.6.6. This was accordingly, as also shown, credited to the extent of Rs. 4,652.6.6 to interest, being the total amount of interest due as at that date, the balance of Rs. 6,682 being credited to principal, thus reducing the principal due as at that date to Rs. 23,318. After that there are successive credits to interest only at the 14th April, 1896, the 17th January, 1902, and the 12th August, 1904, the payments which each of these credits represents being admittedly less than the amount of interest due at the respective dates.

The present suit was raised on the 12th December, 1906, for payment of the balance outstanding. Two of the defendants contested liability, but this was decided against them, and there is now no question of liability. The only question before the Board is as to how the account is to be stated. The plaintiff contends that the account should be stated as it is in the endorsements, *i.e.*, that the payments made should all be credited to interest. The defendants contend that they should be credited to principal as at each date at which they were made, and interest calculated only on the balance as so brought out. The defendants allege that the endorsements before referred to were executed under undue influence. This view, although upheld by the Subordinate Judge, without direct proof but upon what seems a quite unsatisfactory inference, was negatived by the District Judge to whom appeal was taken, and his view was confirmed by the Chief Commissioner on appeal from the District Judge. This makes a concurrent finding so far as this Board is concerned.

Now the law as to payments being applied to principal or interest was laid down by the Board in the case of *Meka Venkatadri Appa Row Bahadur Zemindar Garu and others* v. *Raja Parthasarathy Appa Row Bahadur Zemindar Garu*, decided only a few days ago. Shortly restated, it is this: A creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. A debtor might in making a payment stipulate that it was to be applied only to principal. If he did so, the creditor need not accept the payment on these terms, but then he must give back the money or the cheque by which the money is proffered. If he accepts it, he would then be bound by the appropriation proposed by the debtor. The learned District Judge correctly stated the law in his judgment and accordingly gave decree for the outstanding principal of Rs. 23,318 and interest at the agreed rate from the 12th August, 1893, to the date of the suit, under deduction of the sums paid to credit of interest.

The Chief Commissioner recalled this judgment. He held that, inasmuch as in one of the plaintiff's books there were certain entries as credits to principal with interest at 8 per cent., then, although in the other books the payments were credited to interest, yet the entry in the one book could not be disclaimed by the plaintiff, and he drew the inference that the parties agreed that the payments should be to capital and should only be credited to interest if interest was reduced to 8 annas simple.

Now that entries in the books of the creditor may be taken as indicative of agreement to a proposed appropriation by the debtor need not be denied and is in accordance with the law as above stated. But the learned Chief Commissioner has omitted to notice a fact which in their Lordships' opinion prevents the inference to be drawn as he drew it. It is this: Both parties came into Court with opposing views as to an alleged verbal agreement made after the partial settlement of the 11th August, 1893. The plaintiff averred that it was arranged that thereafter

the interest was to be 8 annas per mensem compound with yearly rests instead of 10 annas simple. The defendant averred that the interest was to be 7 annas 9 pice simple. At the trial neither party pursued his contention, and the interest therefore falls to be paid as per the mortgage. But on the plaintiff's belief it was quite natural that payments should in a book be treated as payments to principal, because if the interest is compound and the payment is credited at the time of the rests, it makes no difference whether the payment is credited to principal or to interest. Apart from this inference, which is fallacious and confounds simple with compound interest, there is no trace of an appropriation to capital proposed by the debtor and acceded to by the creditor. And once the idea of undue influence is gone, the markings signed by the debtor on the back of the mortgage and the entries in all the other books of the plaintiff prove all the other way.

The other point raised by the appellant is as to the rate of interest up to the date of the decree. The Chief Commissioner has reduced this to $3\frac{3}{4}$ per cent., but in the view taken on the main question by the Board the interest must be at contract rate, *i.e.*, 10 annas per mensem simple, up to the date of the decree. After that the rate is in the discretion of the Court.

The appeal must, therefore, be allowed, and the case must go down that the account may be stated in accordance with the view above expressed. The respondents will pay the costs of the appeal and in the Court of the Chief Commissioner. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

RAI BAHADUR SETH NEMICHAND (SINCE DECEASED)

v.

SETH RADHA KISHEN (SINCE DECEASED) AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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