
(1991) 08 MP CK 0036
In the Madhya Pradesh High Court
Case No : F.A. No. 79/86

Devisahai and Others

APPELLANT

Vs

Sardar Govindrao Mahadik and Others

RESPONDENT

Date of Decision : 06-08-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11, Order 34 Rule 7, 97

Citation : AIR 1992 MP 13 : (1992) 37 MPLJ 109 : (1992) MPLJ 109

Hon'ble Judges : S.K. Dube, J;A.G. Qureshi, J

Bench : Division Bench

Advocate : Brijbhankishore and P.K. Saxena and B.N. Barania, for the Appellant;
R.G. Waghmare and M.L. Agrawal, for the Respondent

Final Decision : Dismissed

Judgement

A.G. Qureshi, J.

The appellants have preferred this appeal, aggrieved by the judgment and decree dated 1-10-1986 passed by the District Judge, Indore in C. S. No. 19-A of 1986 directing the appellant to deliver possession of the suit house to respondent No. 1 (plaintiff No. 2) and further directing the appellants to pay a sum of Rs. 14,384/- to the respondents.

The brief facts of the case relevant for decision of this appeal are that one Govindrao Mahadik (deceased) represented by respondent No. 1 executed a possessory mortgage on 26-11-1929 for Rs. 10,000/- in favour of one Devi Sahai, who is dead and represented by his legal representatives, arrayed as respondents Nos. 2(a) to 2(f) and respondent 2(f) having died represented by 2(0) (a) to 2(f)(h). Gyarsilal, original plaintiff No. 2 and Govind Rao Mahadik original plaintiff No. 1 filed Civil Suit No. 14 of 1951 in the court of the District Judge, Indore for redemption of the aforesaid mortgage which was in respect of house No. 41 on 22-2-1951. The plaintiff No. 2 Gyarsilal is the purchaser of the mortgage property from plaintiff No. 1 under the registered sale deed Ex. P. 1

dated 14th October, 1950. After the trial of the suit, vide judgment and decree dated 10-1-1959 the Second Additional District Judge, Indore passed a preliminary decree in favour of the plaintiff against the defendants with costs for redemption of the house making further order therein for taking of accounts to ascertain what is due to the defendants from the date of the mortgage to the date of decree for principal and interest on the mortgage, costs of the suit and other costs along with charges and expenses properly incurred by the defendants up to the date of the decree in respect of his mortgage security together with interest thereon. A Commissioner was directed to be appointed to take the accounts and the amount due made payable within six months of the date on which the accounts are confirmed and countersigned by the court.

Aggrieved by the aforesaid judgment and decree of the Additional District Judge a first appeal was filed before this court which was registered as F. A. No. 14 of 59. Vide, judgment dated 5-3-1964 this court allowed the appeal of Devi Sahai holding him entitled to the benefit of the doctrine of part performance of the contract as against the plaintiffs on a condition of payment of Rs. 24,000/- to the second respondent in that appeal (Gyarsilal) with interest at the rate of Rs. 4/- per cent per annum from the date of delivery of possession to him as vendee till the date of payment or deposits the same in the trial court. If the deposit is not made the appeal was ordered to be dismissed with costs.

Aggrieved by the judgment and decree of this court the respondents Nos. 1 and 2 in the first appeal, filed a civil appeal before the Supreme Court which was registered as C. A. No. 1144 of 69. The appeal filed by the respondents was allowed by the Supreme Court and the judgment and decree of the M. P. High Court in F. A. No. 14 of 59 was set aside and the judgment and decree dated 10th Jan. 1959 passed by the Additional District Judge, Indore in Civil Original Suit No. 14 of 1951 was restored with costs.

After the judgment of the Supreme Court, a Commissioner was appointed for taking accounts as per the terms of decree. The legal representatives of the deceased plaintiff No. 1 Govindrao Mahadik appeared and objected to the appointment of Commissioner and sought possession of the suit house, whereupon the trial court deferred this issue till the settlement of accounts and further held that the legal representatives of Plaintiff No. 1 are entitled to appear before the Commissioner and file objections and are also entitled to file objections on Commissioner's report. Aggrieved by the order allowing the legal representatives of plaintiff No, 1 to participate in the proceedings before the Commissioner, the legal representatives of Gyarsilal plaintiff No. 2, filed a revision before this Court which was registered as C. R. No. 154 of 1985. This Court, vide its order dated 10-12-1985 allowed the revision petition partly, quashing the order of the lower Court permitting the legal representatives of plaintiff No. 1, to appear before the Commissioner and also raise their objections before him and further allowing them to file objections on Commissioner's report.

Thereafter the proceedings continued before the lower court and the

Commissioner filed the report as per directions of the court. After the submission of the report, objections from the parties were invited. However, the main objection of the present appellants was about the amount of interest. According to the appellants-mortgagee, in view of the terms of the deed and the circumstances of the case, the interest which the mortgagee is entitled to get on the mortgage amount has to be compound interest. On the other hand the legal representatives of Gyarsilal (plaintiff No. 2) submitted that the interest which has to be awarded on the mortgage amount can only be simple interest in terms of the preliminary decree. The lower court after considering the respective arguments of the parties was of the view that the language of the judgment is simple wherein the decree is for principal and interest on the mortgage and interest on the mortgage security. The court was also of the view that the principles of dam dupat and Usurious Loans Act are also to be taken into consideration. Therefore, the court was of the view that the L. Rs. of plaintiff No. 2 being the owners of the suit house are entitled to the possession of the suit house. Plaintiff No. 1 was only a pro forma plaintiff. Accordingly a final decree was drawn up. Aggrieved by the aforesaid judgment and decree dated 1-10-1986 this appeal has been preferred by the legal representatives of mortgagee Devisahai.

The learned counsel for the appellants Shri Brijbhushan Kishore has raised multi pronged pleas challenging the judgment and decree passed by the lower Court, According to him the learned lower Court has erred in not looking into the mortgage deed and especially the terms Nos. (2) and (8) of the deed according to which the mortgagor has to pay interest at the rate of Re. 1/- per cent per month regularly every month and the rent was to be realised by the mortgagee from the 1st December, 1929 onwards and was to be credited towards interest on the mortgage amount in the first instance. The account of such realisation of rent was to be made at the end of December every year and the total amount realised was to be credited towards the interest and in case there remains a balance of interest undischarged, the balance shall also carry interest at 1 per cent. Therefore, when the validity of the term No. (8) of the mortgage deed was not challenged by the plaintiffs in the civil suit and no dispute was raised even during the appeal on the questions of interest, then the interest to which the mortgagee is entitled is the compound interest i.e. the interest on the mortgage amount at the rate of Re. 1/- per cent per month every month and the interest at the rate of Re. 1/-per cent per month on the balance of interest which remains undischarged on taking the account every year of the rent which was to be credited towards interest on the mortgage. The Commissioner has wrongly held that the appellant is entitled to get interest at Re. 1/-per cent per month. The Commissioner has wrongly opined that there being no mention of compound interest in the preliminary decree the mortgagee is not entitled to compound interest. The lower court has also fell in error in not considering the aforesaid aspect of the matter. According to Shri Kishore although there is no specific mention of the words "compound interest" in the decree, but when the words

"interest on mortgage" has been used, it impliedly direct the payment of interest according to the terms of the mortgage. As such the question of interest should have been held to have been decided in favour of the mortgagee. The preliminary decree has been misinterpreted by the lower Court.

According to Shri Kishore in view of *M. Manickchand and Others Vs. Elias Saleh Mohamed Sait and Another*, a preliminary decree finally decides only those points which the court is required to decide or choose to decide at that stage. The plea of relieving the mortgagor of the condition regarding compound interest under the provisions of the Usurious Loans Act, Interest Act or principle of dam dupat had to be raised at the time of the preliminary decree. These pleas cannot be taken at the stage of final decree. Shri Kishore has also placed reliance on another Supreme Court judgment reported in *Soli Pestonji Majoo and Others Vs. Gangadhar Khomka*, ; AIR 1940 20 (Federal Court) in support of his argument that interest on mortgage dues is governed by the agreement between the parties. Even the discretion under Order 34, Rule 11, C.P.C. has not been exercised by the Court because the plaintiff did not choose to raise that issue. In support of his argument Shri Kishore has also relied on another Supreme Court authority reported in *Srinivasavardachariar and Others Vs. Gopala Menon and Others, S. Varadachariar v. Gopala Menon*. Shri Kishore has also cited authorities in support of his argument that the interest on the interest due is not unfair and is permissible under the law. He has also distinguished the judgment reported in *Mhadagonda Ramgonda Patil and Others Vs. Shripal Balwant Rainade and Others, Mhadagonda Ramgonda Patil v. Shripal Balwant Rainade* on the ground that although the principle of dam dupat is applicable to the mortgage, but this point was not raised or decided at the time of preliminary decree, therefore, it cannot be looked into at the stage of final decree. Therefore, in the facts and circumstances of the case the principle of dam dupat is not applicable to the present case.

Shri Kishore, learned counsel, has further emphatically argued that once a preliminary decree is passed; the court while passing a final decree cannot go beyond the preliminary decree and any finding of the court at the time of passing of final decree in respect of a point which has already been decided in the preliminary decree operates as constructive *res judicata*. The preliminary decree is final and it is not an interlocutory order. He has cited AIR 1977 SC 392 in support of his aforesaid submission. According to Shri Kishore the issue of compound interest should have been challenged in the plaint but when it was not so challenged and the preliminary decree was passed, the court while passing the final decree could not go into the provisions of dam dupat or Usurious Loans Act. The final decree should have been passed in accordance with the terms of the mortgage deed.

On the other hand the learned counsel for the respondent No. 2 (legal representatives of Gyarsilal) Shri Waghmare, also agrees that the Commissioner and the court cannot go behind the preliminary decree. According to Shri

Waghmare, Section 97, C.P.C. clearly provides that all matters are concluded by preliminary decree. In support of his aforesaid contention Shri Waghmare has placed reliance on the Supreme Court judgment reported in Venkata Reddi and Others Vs. Pothi Reddi, and judgment of this court and of Allahabad, Bombay Madras and Patna High Courts. According to Shri Waghmare the court cannot look into any other document except the judgment and the preliminary decree passed by the Court while passing the final decree. A bare reading of the preliminary decree would show that the interest awarded is a simple interest and not compound interest. It provides for calculation of simple interest from the date of the mortgage till the date of preliminary decree i.e. 10-1-1959.

A cross-objection has also been filed by the respondents (legal representatives of Gyarsilal) against the order impugned claiming that the trial Court has erred in not considering the provisions of Section 9 of the Money Lenders Act, 1934 and that both the parties being Hindus they are governed by the Rule of dam dupat and as the total amount of income from the mortgage property is Rs. 1,20,723.00 and the amount of costs, charges and expenses is Rs. 28,839/- and the amount of interest on Rs. 1,20,723/- comes to Rs. 13,817.16 and on Rs.29,839/- comes to Rs. 3,458.59, the respondents are entitled to get Rs. 10,358.57 more from the appellants on this count. It has further been stated that the trial Court should have awarded to the appellants-mortgagees only Rs. 10,000/- on account of interest on principal amount of Rs. 10,000/- instead of awarding Rs. 67,500/- because according to the principles of dam dupat the amount of interest cannot be more than the principal amount. Therefore, the court has erred in awarding Rs. 57,500/- more as interest to the appellants than to what they were legally entitled.

Before considering the respective arguments of the parties, let us state at the outset that after hearing the arguments this judgment could not be passed for quite some time in view of the fact that one of us (Hon"ble Shri S.K. Dube, J.) was posted at other station. However, the detailed notes of the arguments taken by us coupled with the valuable assistance given by both the learned counsel in supplying the synopsis of the case along with the relevant judgments cited by them, we proceeded to consider the arguments advanced by the learned counsel.

Now, in view of the arguments advanced by both the learned counsel, it is not disputed before us that the terms of the preliminary decree have to be interpreted by us as both the learned counsel have stated that the court while passing a final decree cannot go beyond the preliminary decree. The contentions of the learned counsel find support from the Supreme Court judgment on this point in Venkata Reddi and Others Vs. Pothi Reddi, in which the following principle of law has been announced (at page 995):

"A decision is said to be final when, so far as the court rendering it is concerned, it is unalterable except by resort to such provisions of the CPC as permits its reversal, modification or amendment. Similarly a final decision would mean a decision which would operate as res judicata between the parties if it is not

sought to be modified or reversed by preferring in appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree the decree which would be executable would be the final decree. But the finality of a decree or decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made, the decision of the court arrived at the earlier stage also has a finality attached to it. Section 97 Civil P.C. clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

As such from the above judgment it is clear that a preliminary decree passed in a mortgage suit or partition suit is not a tentative decree, but should be regarded as conclusive in respect of the matters dealt with in the preliminary decree. Although when the legislature provides for a preliminary decree and a final decree to be passed and the final decree executable, however, that would not mean that a preliminary decree is a tentative decree or an interlocutory order. The provisions of Section 97, CPC attach a finality to the preliminary decree in respect of the matters decided by it. In view of Section 97, CPC when a party aggrieved by the preliminary decree does not appeal from it, he is precluded from disputing its correctness which may be preferred from the final decree. The same principle reiterated in another Supreme Court judgment in the case of *M. Manickchand and Others Vs. Elias Saleh Mohamed Sait and Another*, As such in view of the settled position of law by the Supreme Court and the common ground taken by the learned counsel for both the parties it cannot be disputed that the court while passing the final decree cannot reopen any issue decided by the preliminary decree.

Another point in which there appears to be no dispute is that the principle of *dam dupat* is applicable in suits for redemption of mortgage. This controversy also stands resolved by a recent judgment of the Supreme Court in *Mhadagonda Ramgonda Patil and Others Vs. Shripal Balwant Rainade and Others*, wherein the Supreme Court has held as under (at page 1204):

"The rule of *dam dupat* is an equitable rule debarring the creditor to recover at any given time the amount of interest which is in excess of the principal amount due at that time. It could not be said that the rule is applicable only to a simple loan transaction and not to a transaction of mortgage. In every mortgage there are two aspects, namely (1) loan, and (ii) transfer of interest in immovable property. As mortgage is principally a loan transaction, the rule of *dam dupat* which is an equitable rule would also be applicable to mortgage."

Now, therefore, in view of the aforesaid authorities and the arguments advanced

by the learned counsel, the main question which arises for determination is, whether the lower court, while passing the preliminary decree, awarded compound interest on the mortgage amount or simple interest. The learned counsel for the appellant Shri Kishore has cited many authorities of different High Courts wherein it has been held that when there is an agreement between the parties to pay compound interest in the mortgage deed, then the court can allow the compound interest according to the terms of the agreement. Shri Kishore has also strenuously argued that the District Court while passing the preliminary decree has awarded interest according to the terms of the mortgage deed and a bare reading of Clauses (2) and (8) the mortgage deed would show that the appellant is entitled to get compound interest on the mortgage amount. According to Shri Kishore as the applicability of the principle of dam dupat, the Usurious Loans Act and Interest Act has been raised before the trial court before the passing of the preliminary decree, these issues could not be raised while passing of the final decree because it is settled position of law that the court while passing the final decree cannot go beyond the terms of the preliminary decree.

On the other hand Shri Waghmare, learned counsel for the respondents argues that the preliminary decree cannot be construed to mean that interest has to be calculated on the basis of mortgage deed. The language of the preliminary decree is plain and simple allowing simple interest on the mortgage amount and principles of dam dupat, Usurious Loans Act and Interest Act can always be considered by the Court, the principles contained therein being equitable for relieving the debtors from payment of excessive interest.

For appreciating the respective contentions of the parties on this point, let us first look at the averments in the plaint and the written statement and the finding of the court on the issue of interest. Para 3 of the plaint in original Civil Suit No. 14 of 51, reads as under:

"Transaction of the aforesaid mortgage is in the nature of mortgage with possession, but in lieu of rent of this house the defendant is entitled only to get interest at the rate of 1 per cent per month on mortgage amount. Similarly as per terms of the mortgage deed the defendant may keep tenant of his choice in this house, subject to the condition that the front, portion of this house shall not be rented out to the tenants on a rent not less than Rs. 515/- and if the defendant wants to keep this in his own possession he may do so on payment of Rs. 515/- per year."

(Emphasis by us).

As such in the plaint it was stated by the plaintiff that the defendant is entitled to get interest at the rate of Re. 1/- per cent per month on the mortgage amount. Now, the defendant in his written statement in para 3 has pleaded that according to the term of the mortgage deed, the defendant is entitled to get interest at the rate of Re. 1/- per cent per month and shall be entitled to keep tenants in the

house. It was further stipulated that after deducting the rent of the house from the amount of interest, if any amount of interest remains due, then the defendant shall be entitled to get interest on that unpaid amount of interest at the rate of Re. 1/- per cent per month from the mortgagor.

(Emphasis by us).

Now, in the judgment and decree passed by the trial court on 10-1-1985 the learned lower court, has decided the five issues raised by the court and issue No. 5 is pertaining to relief. While deciding issue No. 5 the suit of the plaintiffs was decreed with costs and a preliminary decree for redemption of the house in suit was awarded in favour of the plaintiff further directing the accounts to be taken of whatever was due to the defendant from the date of the mortgage to the date of the decree, principal and interest on the mortgage and other costs, charges and expenses. As such although the defendant had pleaded the entitlement of compound interest in the written statement, still the trial court while giving finding in respect of the interest did not allow the compound interest because nowhere in the judgment or decree it has been indicated that the mortgagee shall be entitled to get the interest as per the terms of the contract. On the contrary Clause (1) of the decree states that the account has to be taken of an amount what is due on this date to the defendant for principal and interest on mortgage mentioned in the plaint. It does not say that the interest has to be calculated on the basis of the terms of mortgage deed, or interest on the amount of interest due. The decree only refers to the interest on mortgage mentioned in the plaint.

According to Shri Kishore, learned counsel for the appellant, the word "mortgage" used in the preliminary decree would refer to the terms of the mortgage deed and, therefore, Clauses (2) and (8) of the mortgage deed have to be taken into consideration and as such the interest which is payable to the mortgagee is in accordance with the terms of the mortgage deed. We are unable to agree with this submission made by the learned counsel for the simple reason that when a specific plea was raised by the defendant in para 3 of the written statement claiming compound interest and the court did not give any finding on that plea, it will be presumed that the aforesaid contention did not find favour with the court: otherwise an issue would have been raised in respect of the entitlement of the defendant of the compound interest and in that event the court would have examined the principles of *dam dupat* and the Usurious Loans Act etc.... But the court has given no specific finding on this issue but simply directed the ascertainment of the interest on the mortgage as mentioned in the plaint. Now, in the plaint the terms of the mortgage have been specified in para 3 wherein only a mention of interest at Re. 1/- per cent per month on the mortgage amount has been stated. Even assuming, in view of the aforesaid that the court did not decide the issue of interest while passing the preliminary decree and left it open for the court passing the final decree, after the report of the Commissioner, then also the appellant has nothing to gain because in that case,

the court can always consider the issue of dam dupat while awarding the interest and in that case the amount of interest would not exceed the principal amount, because the principal of dam dupat is also applicable to mortgage suits as has been held by the Supreme Court in *Mahadsgonda Ramgonda Patil v. Shripal Balwant Rainada* (supra).

Shri Kishore in support of his argument in respect of entitlement of the mortgagee to get compound interest has cited the Supreme Court judgment of *Soli Pastonji Majoo v. Ganga Dhar Khemka* (supra) wherein the Supreme Court has held that Order 34, Rules 1 and 4 which apply to a mortgage suit enjoins the court to order an account to be taken of what is due to the plaintiff on the date of such decree for principal and interest on the mortgage. The special provision in Order 34 is, therefore, to be applied is preference to general provision in Section 34. Till the period for redemption expires the matter is considered to remain in the domain of contract and the interest has to be paid at the rate and with the rates specified in the contract of mortgage. But after the period of redemption has expired the matter passes from the domain of contract to that of judgment. The right of the mortgagee will henceforth depend not on the contents of his bona fides but on the directions of the decree and, therefore, under Order 34, Rule 11 there is discretion with the court in respect of interest pendente lite and subsequent interest and it is not obligatory on the courts to decree interest at the contractual rates,

Now, in the aforesaid judgment the Supreme Court has of course laid down that till the expiry of the period of redemption the interest can be allowed in accordance with the contract rate. But this authority does not help the case of the appellant at all, for the simple reason that the preliminary decree has not been passed allowing the interest at the contractual rate and if it has to be held that the court passing the preliminary decree did not decide the question of the rate of interest to be paid to the defendant, then this would lead to a finding that the matter of interest has to be decided by the court passing the final decree and in that event, as held earlier the principles of dam dupat and other provisions pertaining to interest will have to be considered by the court passing the final decree. Therefore, in view of the aforesaid Supreme Court authority, it cannot be held that because a principle has been enunciated that till the date of redemption the interest rate shall be within the domain of the contract of mortgage, it necessarily follows that despite a clear pleading on the point if the court does not allow compound interest specifically then the preliminary decree shall be interpreted to mean that interest has been allowed on the contract contained in the mortgage deed. In our opinion a plain construction of the preliminary decree would show that despite the pleading of the defendant claiming compound interest in para 3 of the written statements, the court has not passed any order allowing the defendant compound interest. When in the judgment and decree the word "interest" only has been used by the trial court without holding that the interest shall be according to the terms of the contract, the court passing the final decree could not read it as compound interest.

Shri Kishore, learned counsel, has also cited judgments of various High Courts to show that the compound interest is permissible in cases like the present one. He has specifically drawn our attention to the judgments of the various High Courts where, in similar circumstances, compound interest was allowed by the courts, but in view of the aforesaid discussion the judgments cited by Shri Kishore do not help the case of the appellants, because in the preliminary decree the court has not allowed the compound interest to the appellants whereas in the judgments cited by Shri Kishore the courts have allowed the interest at the contractual rates. As such, while passing the final decree the lower court could not open the issue about the interest.

Shri Waghmare, has also cited various authorities in support of the order of the lower court directing the delivery of possession of the suit house to the respondent. Without going into the various Supreme Court authorities we may refer only to one judgment of the Supreme Court in the case of *Jadavji Purshottam Vs. Dhami Navnitbhai Amaratlal and Others*, wherein it has been held that when the mortgagors had not empowered the mortgagee to create a lease which would be binding on them after the redemption of the mortgage and the tenant's right, as a tenant, did not become enlarged by means of any Tenancy legislation which came to be enacted after the lease was granted, the tenant could claim tenancy rights only against the landlord who is the mortgagee and not against the mortgagor. As soon as the mortgagee's rights became extinguished by the re-demption of the mortgage, neither he nor anyone inducted by him has a right to be in possession of the mortgage property. Consequently, the mortgagors were entitled to seek ejectment of the mortgagee and the tenant inducted by him. The tenant has no independent right and hence it was not necessary that he should have been made a party to the suit filed by the mortgagee or the execution application taken out by the mortgagors after the redemption of the mortgage. His position was akin to that of sub-tenant whose rights were coterminous with those of the tenant himself. In view of the aforesaid Supreme Court authority the order of the learned trial court directing the possession of the house to be given to the plaintiff No. 2 cannot be held to be erroneous.

The cross-objection filed by the respondents is based on the principle of *dam dupat* and different provisions of the Acts pertaining to rate of interest. According to Shri Waghmare, learned counsel, the principles of *dam dupat* can be invoked by the court at any stage of the proceedings because the principle is a development of *Shastrik Law* and *Arthashastra* *Yedvalky*, *Kautillya*, *Gautam*, *Vishnu*, *Narad*, *Manusmriti*, *Smritichandrika* have even in good old times laid down directive principles providing protection against usury of loans. The mode in Laws i.e. *Money Lenders Act*, *Usurious Loans Act*, *Interest Act* and other State enactments are modern developments of Law providing protection against the recovery of interest and are projections of the rule of *dam dupat* in the modern age, Shri Waghmare has also cited the observation of learned writers in *Hindu Law* by *Mills* and *Raghavachariar*. Shri Waghmare has also cited various

authorities in support of his argument that the principles of dam dupat are applicable to the facts of the instant case.

We have already considered the latest Supreme Court judgment on this point and have held that the principles of dam dupat are applicable to the mortgage suit also. However, in the instant case the question before us is of the interpretation of the preliminary decree. The principles of dam dupat and other provisions of the Interest Act can be looked into only when we are of the opinion that the question of award of interest was to be decided by the court passing the final decree and it was not so decided by the court passing the preliminary decree. But we have held above that there is a direction by the court passing the preliminary decree in respect of interest to be calculated on the principal amount of mortgage and, therefore, on a bare perusal of the preliminary decree it will be obvious that the question was not left undecided by the court passing the preliminary decree. Therefore, while passing the final decree the court was not required to reopen the question of interest and invoke the provisions of dam dupat and Usurious Loans Act etc. Therefore, in our opinion, the cross-objection also has no merit. In view of the aforesaid the various authorities cited by Shri Waghmare need not be discussed in detail.

In the result the appeal of the appellants and the cross-objection filed by the respondent No. 2 deserve to be dismissed being without any merit. Accordingly the appeal and cross-objection are dismissed with costs, Counsel's fee to be taxed according to schedule.