

**(1936) 02 CAL CK 0034**  
**In the Calcutta High Court**  
**In Re: Gopiram Gobindram**

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**Date of Decision :** 28-02-1936

**Acts Referred:**

**Citation :** AIR 1938 Cal 20 : 173 Ind. Cas. 898

**Hon'ble Judges :** Derbyshire, C.J;Costello, J

**Bench :** Full Bench

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### **Judgement**

Derbyshire, C.J.—Here the borrower is making payments to the lender under a mortgage deed at the rate of something over Rs. 7,500 per month. The mortgage deed stipulates that the rate of interest on the loan is to be ten annas per cent. per month, that such interest is to be paid monthly, that in the event of simple interest for any consecutive period of twelve months remaining unpaid, the borrower will have to pay compound interest at the rate of ten annas per cent. for each month, that the borrower is to make payments at the rate of Rs. 7,500 per month, that such payments are to be credited in the first instance towards interest and the balance set off against the principal due and that in default of this payment the assessee creditor is to enter into possession of the property and, while in possession, to realize and receive the rents etc., and to apply the net rent etc. remaining after paying and discharging all costs of realization, firstly, in paying himself the monthly instalments of interest and, secondly, in applying the residue in and towards the reduction of the principal monies. We are told that in accordance with the terms of this agreement the assessee took possession of the property in March 1932 and the question that has been propounded is this:

Whether it is open to a mortgagee notwithstanding a stipulation in the mortgage deed to apply payments, or in case when the mortgagee has taken possession, the net realizations of the mortgaged property towards interest, to appropriate such payments or realizations with or without the consent of the mortgagor towards principal.

2. We are concerned only with the first alternative, namely before the mortgagee has entered into possession; we are not concerned with any other case: that is

the only case that arises here. I think the principle to be applied has been laid down in the case of Maharaja of Darbhanga reported in AIR 1933 108 (Privy Council) :

Where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest.

3. I think that principle is applicable to this case. But beyond that there is the definite stipulation in the mortgage deed that the money paid is to be appropriated, in the first instance, towards payment of interest and the balance set off against the principal due. It seems to me that what the mortgagee must do here is to apply the money received in accordance with the provisions of the mortgage deed. The income tax authorities are certainly entitled to assume that he is doing it. In my view, there can only be one answer to that part of the question with which we are concerned and the answer to the question is in the negative and the Commissioner of income tax will have the costs of these proceedings. We have something to say about the form of the question as originally suggested by the petitioner in this case. Two questions were rolled up in the form of one question. We have endeavoured to answer it in the light of the facts stated in this particular case. We think that when questions are asked for our opinion, one question should be asked at a time; an attempt should not be made to combine two or more questions in the form of one question. Further, the questions should not be divorced from the facts of the particular case and should not be in the abstract as is the case here.

Costello J.

4. I agree.