

(1909) 04 CAL CK 0023
In the Calcutta High Court

Solimunnisa and Another

APPELLANT

Vs

Shaikh Jonab Ali and Others

RESPONDENT

Date of Decision : 22-04-1909

Acts Referred:

Citation : (1909) 04 CAL CK 0023

Final Decision : Dismissed

Judgement

Mookerjee, J.—This is an appeal on behalf of the plaintiffs in an action for recovery of money due upon an instalment mortgage bond executed in their favour on the 2nd December 1892, by persons now represented by the defendants respondents. On that date the mortgagors took a loan of Rs. 400 and by the bond agreed to repay Rs. 800 in eight instalments of Rs. 100 each. The first instalment was payable on the 11th February 1894 and the latter instalments on the corresponding date of subsequent years down to 1901. The mortgage bond contained a stipulation that, if default was made in payment of an instalment, all the instalments would forthwith become due and recoverable with compound interest at 36 per cent per annum. On the 11th September 1900 the mortgagees commenced an action to recover Rs. 3,522 upon the bond on the allegation that default had been made in payment of the instalment due for 1895 and they had become entitled to recover all the instalments with compound interest. The Court of first instance made a decree in favour of the plaintiffs, but disallowed a portion of the claim for interest. Upon appeal the District Judge found that the instalments for 1894, 1897 and 1891 had been paid in full, that Rs. 35 had been paid out of the instalment for 1895, Rs. 40 out of the instalment for 1898 and Rs. 93 out of the instalment for 1898. He further found that the instalment for 1900 had been duly tendered but refused. On these facts, as upon other circumstances relating to the conduct of the parties to which it is not necessary to refer in detail, the District Judge came to the conclusion that although there was a default in 1895, the mortgagees had waived their right to enforce the stipulation of the bond. He thereupon dismissed the suit. This decision was subsequently affirmed on appeal to this Court. On the 3rd July

1906, the mortgagees instituted the present action to recover Rs. 1,199 on the same instalment bond. They alleged in their plaint that since the institution of the previous suit, the instalment for 1901 had fallen due, and further that although the previous suit had been dismissed, they were entitled to recover whatever was due on the mortgage on the footing that default was made in 1895 whereupon they became entitled to recover compound interest upon all the instalments at 36 per cent per annum.

2. The Court below concurrently held that the plaintiffs are entitled to recover the instalment for 1901, but nothing in respect of any previous instalment. The Subordinate Judge as well as the District Judge have come to this conclusion on the ground that the part of the present claim which relates to instalments before 1901 might and ought to have been enforced in the previous suit. In this view they have made a decree in favour of the plaintiff for the instalment of 1901 only. As regards interest they have held that the stipulation for payment of compound interest was in the nature of penalty and not enforceable and have consequently allowed simple interest in the shape of damages at 36 per cent per annum.

3. The plaintiffs have now appealed to this Court and on their behalf the decision of the District Judge has been challenged on only one ground, namely, that the principle of *res judicata* has no application to this case and that notwithstanding the decision in the previous suit the plaintiffs are entitled to recover not only the instalment for 1901, but whatever is due in respect of any previous instalment on the footing that upon default made in 1895 they became entitled to recover all the instalments with compound interest at 36 per cent. In answer to this argument it has been contended by the learned Vakil for the respondent that, so far as the instalments before 1901 are concerned, what is now urged as a ground for the claim might and ought to have been made a ground of attack in the previous suit and as the plaintiffs omitted to do so they are debarred under explanation 2 of Section 13 of the Code of 1882. In my opinion the contention of the respondent is well-founded on principle and is amply supported by authorities and must consequently prevail.

4. When the previous suit was commenced on the 11th September 1900, all the instalments from 1894 to 1900 had fallen due. So far, therefore, as all the instalments excepting the one for 1901 was concerned the plaintiffs were entitled to recover whatever was due thereupon irrespective of any question of default on the part of the mortgagors. They might have urged in the alternative as regards a substantial part of their claim that, in any view of the case, they were entitled to a decree in respect thereof. They omitted to do so. Are they entitled now to urge in support, of their claim the ground which they might have taken in the previous suit? In my opinion they are not entitled. It was pointed out by their Lordships of the Judicial Committee in *Kameswar Pershad v. Raj Kumari Ruttan Koer* L.R. 19 IndAp 234; 20 C. 79, that whether a ground of attack which might have been taken in a previous suit ought to have been so taken depends upon

the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion the construction of the word ought would become important. In the case then before their Lordships the matters were the same, what was urged in the later suit was only an alternative way of seeking to impose a liability upon the defendants and, therefore, it ought to have been made a ground of attack in the former suit and so it must be deemed to have been a matter directly and substantially in issue in the former suit and, therefore, *res judicata*. The same view had been taken by their Lordships in *Mahabir Pershad Singh v. Macnaghten* L.R. 16 IndAp 107; 16 C. 682 and has been applied in a variety of cases in this country amongst which reference may specially be made to *Shama Charan Banerji v. Mrinmayi Debt* 31 C. 79, *Akayi Kunhi v. Ayissa Rai* 26 M. 645, *Guddappa v. Tirkappa* 25 B. 189 p. 192. In the last of these cases the decisions on the subject were reviewed by Sir Lawrence Jenkins, C.J., and it was pointed out that the test was were the matters so dissimilar that their union might lead to confusion? To my mind there is in this case but one answer to that question, namely, there would have been certainly no confusion but the two alternative grounds might be quite appropriately put forward. In the words of Mr. Justice West in *Haji Hasam Ibrahim v. Mancha Ram Kalian Das* 3 B. 137 at p. 140, the plaintiff having striven to establish their claim by one means and failed, cannot now establish that claim by other means which were equally at their command when the former suit was tried and so connected with the grounds on which they in that case relied that they ought to have been submitted for consideration together. It is further worthy of note that if the plaintiffs were now permitted to succeed in their claim, the result in substance would be a reversal of the earlier decision. It was there found by the District Judge, and his view was affirmed by this Court, that the plaintiffs had waived their right to claim compound interest upon all the instalments in the event of default in payment of one of them. They now put forward the identical claim and urge that they are entitled in the present suit to recover what is due upon every one of these instalments with compound interest at 36 per cent, per annum. This is precisely the claim which they had put forward in the previous litigation. It is difficult to appreciate upon what principle they can be allowed to reagitate the same question. As was observed by this Court in the case of *Lilabati Misra v. Bishun Chobey* 6 C.L.J. 621, an estoppel is not confined to any one finding in the judgment, but extends to all facts involved in it as necessary steps or ground works; in other words a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment. Now the decision in the previous suit was based on the finding that the plaintiffs had waived their rights to enforce the stipulation for payment of compound interest upon default. That finding operates as *res judicata* between the parties. Even if the matter were open for reconsideration this view would furnish a conclusive answer to the most substantial portion of the claim in the present suit. On these grounds I feel no doubt that the view taken by the Courts below is correct. No other question has been argued before me and no reference has been made either as to the precise amount due or the principle upon which the interest on the instalment of 1901

has been calculated. The sole ground urged in support of the appeal fails which must consequently be dismissed with costs.