APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

May 3.

KO SAN MYA AND ONE (APPELLANTS)

v.

A.R.S.A. FIRM (RESPONDENT).*

Money-lenders' Act, 1945—S. 13, clause (a)*—Whether final mortgage decree for sale could be reopened under—Interest after 8th December 1941—Whether s. 3, Accrual of Interest (War-Time Adjustment) Act, 1947, applies to decrees.*

Held : That British subjects in India did not become alien enemies of the people in Burma when Burma was occupied by the Japanese.

V.E.R.M. Krishnan Chettyar v. *M.M.K. Subbiya Chettyar*, 1948 Bur. L.R. 278, followed.

S. 13 (*a*) of the Money-lenders' Act, 1945, provides that in an appeal arising out of a final decree in a mortgage suit whether filed before or after the commencement of the Act, the court may reopen the transaction ; in so doing the court can reopen the preliminary decree also.

Renula Bose, Srimati v. *Rai Manmatha Nath Bose and others*, L.R. 72 I.A. 156, followed and applied.

Held further : That in respect of the two transactions, dated 30th October 1929 and 12th December 1930, which had been settled on 14th June 1936 and the appellant agreed to pay in annual instalments, it would not be fair to reopen the same as appellant cannot be allowed to benefit by his own wrong.

In reopening the transaction, the Accrual of Interest (War-Time Adjustment) Act, 1947, could not be considered as disallowing interest after 8th December 1941, as the said Act does not apply to a decree.

Bank of Chettinad, Limited v. *Chuah Bun Hock*, Civil Misc. No. 69 of 1947, followed.

Thein Moung for the appellant.

P. K. Basu for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from a final decree for sale of mortgaged properties passed in Civil Regular Suit No. 6 of 1944 of the Divisional Court of Myaungmya which was originally Civil Regular Suit No. 2 of 1941 in the District Court of Myaungmya.

* Civil 1st Appeal No. 69 of 1947 against the decree of the Divisional Judge's Court of Myaungmya in Civil Regular Suit No. 6 of 1944, dated the 5th August 1944.

The appeal itself was pending in the Supreme Court of Burma as Civil 1st Appeal No. 21 of 1944 ; at the time of the liberation of Burma it has been treated as Civil 1st Appeal No. 69 of 1947 of this Court.

The principal grounds of appeal are to the effect that the respondent became an enemy alien within the mischief of section 83 of the Code of Civil Procedure as soon as Burma declared war on the British Empire, and that the Divisional Court erred in granting him the final decree as if he still had a *locus standi* for the same.

However, in view of the recent ruling by this Bench in *V.E.R.M. Krishnan Chettyar* v. *M.M.K. Subbiya Chettyar* (1) which is to the effect that Indian British subjects in India did not become alien enemies and the contracts of agency between them and their agents in Burma were not abrogated in spite of the said declaration of war and the enemy occupation of Burma, the learned advocate for the appellants does not press the appeal on this ground at all.

He has merely submitted that we should reopen the decree and relieve the appellants of all liability in respect of any interest in excess of 12 per cent per annum under clause (*a*) of section 13 of the Money-lenders' Act, 1945.

We have entertained his verbal application to reopen the decree under the Act as the learned advocate for the respondent admits that he has had notice of the intention to make the application. In fact the learned advocate for the respondent has not objected to the application having been made orally. He has merely contended that the Court has no power to reopen a final decree at all.

Section 13, clause (*a*), of the Act provides that in any appeal arising out of any suit or proceeding, whether

(1) 1948 Bur. L.R. 278.

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filed before or after the commencement of the Act, in respect of a loan advanced before the commencement of the Act, the Court may reopen the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any interest in excess of 12 per cent simple per annum in the case of a secured loan. Now this is an appeal arising out of a suit on loans which were advanced on two mortgages before the commencement of the Act. So *prima facie* this Court has power to reopen the transaction which forms the basis of the final decree and to relieve the debtor of all liability in respect of any interest in excess of 12 per cent per annum.

The learned advocate for the respondent has contended that the Court has no power to reopen a final decree for sale inasmuch as decrees are not mentioned in clause (*a*) and the transaction which the Court may reopen has been merged in the final decree. However, he realizes that the provision that transactions can be reopened in appeals arising out of suits or proceedings relating to them would be meaningless since all transactions must have been merged in decrees so far as appellate Courts are concerned. So he concedes that this Court would have had power to reopen the transaction if the appeal before it were an appeal from the Preliminary Decree for Sale of mortgaged properties and not from a Final Decree for Sale thereof. For this distinction he relies on section 97 of the Code of Civil Procedure. However this section merely provides, "Where any party aggrieved by a Preliminary Decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the Final Decree." In asking the Court to reopen the transaction or rather the Final Decree under section 13 of the

Money-lenders' Act, 1945, the learned advocate for the appellants is not disputing the correctness of the Preliminary Decree. He merely asks that the appellants may be allowed to have the benefit of the Act which has come into force since the Preliminary Decree and the Final Decree were passed.

For the above reasons, we are of the opinion that for the purpose of reopening a transaction in exercise of the power under clause (*a*) of section 13 of the Money-lenders' Act, 1945, an appellate Court can reopen the decree of which the transaction forms the basis and in which the transaction may have merged. The fact that the decree to be reopened is a final one does not make any difference to the power of the Court although the fact that there was no appeal from a Preliminary Decree may have to be taken into consideration in connection with the question whether the Court should exercise its discretion to reopen a transaction or a decree in a case where The Money-lenders' Act came into force before the Final Decree was passed. In *Renula Bose, Srimati* v. *Rai Manmatha Nath Bose and others* (1) their Lordships of the Privy Council held that sub-section 1 of section 36 of the Bengal Money-lenders' Act, 1940, empowered the appellate Court to reopen a decree although the sub-section did not specifically mention judgment or decree as one of the matters which the Court may reopen. One of the reasons which weighed with their Lordships was that "the second proviso to the sub-section enacted that in the exercise of its powers the Court shall not do anything which affects any decree of a Court other than a decree in a suit to which this Act applies . . . . ." And section 13 of The Money-lenders' Act, 1945, contains a similar proviso which reads, "Provided that in the

(1) 72 I.A. 156.

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exercise of these powers the Court shall not . . . : (ii) do anything which affects any decree of a Court in a previous suit."

There is a *prima facie* case for reopening the final decree inasmuch as only Rs. 8,000 out of the decretal amount of Rs. 22,759-8 is the principal.

To begin with there were two mortgages, one dated the 30th October 1929 for Rs. 15,000 with interest at one and a half per cent per mensem compoundable with 12 months' rests, and the other dated the 12th December 1930 for Rs. 10,000 with interest at one and a half per cent per mensem compoundable annually. However, according to the written statement of the defendants-appellants, the said loans entered a new phase on the 14th June 1936. On that date, the defendants-appellants paid Rs. 5,000 towards the principal amounts due on the two mortgages and the plaintiff-respondent agreed to forego such interest as may accrue thereafter if the defendants-appellants would repay Rs. 20,000, *i.e.* the balance of the principal amounts of the two mortgages, by four or five yearly instalments of Rs. 5,000 or Rs. 4,000 each. Besides, it is common ground that all interest due on the two mortgages up to the 2nd April 1935 has been paid. The plaintiff-respondent has had to file the suit, out of which the present appeal has arisen, on the 25th October 1941, as the defendants-appellants failed to pay the balance of the principal amounts in four or five yearly instalments as stated above. (*Cf.* the finding of the learned District Judge at page 62 of the trial record.)

Under these circumstances, the transaction falls into two parts. The first part has been closed with a liberal offer on the part of the plaintiff-respondent to forego interest after the 14th June 1936 altogether which was accepted by the defendants-appellants; and

the second part of the transaction is really the part which form the basis of the decree now under appeal. It will not be fair to reopen the first part of the transaction inasmuch as the defendants-appellants cannot be allowed to have any benefit in respect thereof on account of their own failure to perform their part in connection with the second part of the transaction, *i.e.* by their own failure to pay the balance of the principal amounts by yearly instalments. It is a well-known rule of law that no man can take advantage of his own wrong. Besides, in this particular case, if the defendants-appellants had not undertaken to repay the principal amounts by four or five yearly instalments, the plaintiff-respondent might have taken immediate steps for recovery thereof instead of waiting for about five and a half years.

With reference to the second part of the transaction, which we are reopening, the plaint itself shows that the plaintiff-respondent's claim of Rs. 20,000 consists of the claim for Rs. 8,000 only as principal and Rs. 12,000 as interest. Although the interest claimed in the plaint is only Rs. 12,000 the total amount of interest which has accrued due on the two mortgages from the 2nd April 1935 to the 25th October 1941 is Rs. 17,259. The amount of interest has been reduced to Rs. 12,000 only, as the plaintiff-respondent has waived his claim to Rs. 5,259 out of the said amount of interest.

Rs. 17,259 is the amount of interest calculated at one and a half per cent per mensem ; so, interest at one per cent per mensem will be Rs. 11,506 only and the amount claimed as interest by the plaintiff-respondent is in excess thereof by a sum of Rs. 494.

Besides, the lower Court has allowed interest at the contract rate of one and a half per cent per mensem on the principal amount of Rs. 8,000 from the date of the institution of the suit, *viz.* the 25th October 1941 up to

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the 31st July 1942, *i.e.* the date on or before which payment of the amount declared due under the preliminary decree is to be made in accordance with the provisions of Order 34, Rule 6 of the Code of Civil Procedure. Interest so allowed amounts to Rs. 1,104. Calculated at the rate of one per cent per mensem only such interest will amount to Rs. 736 only. So the amount that has been allowed by the lower Court in this respect must be reduced by the sum of Rs. 368 only.

Thus the total amount of interest in respect of which we shall relieve the defendants-appellants from liability under clause (*a*) of section 13 of the Money-lenders' Act, 1946, is Rs. 494 *plus* Rs. 368, *i.e.* Rs. 862 in all.

The amount in respect of which they are relieved of liability may appear at first sight to be somewhat small. However, it must be remembered that the plaintiff-respondent has already waived his claim to Rs. 5,259 out of the interest due on the two mortgages.

The preliminary decree must be modified as follows : (1) by reduction of Rs. 862 from the amounts mentioned in the Schedule A thereto as due for principal and interest on the two mortgages, and (2) by consequential reduction of the amount of the costs of the suit which has been allowed to the plaintiff, item 3 in the schedule to the preliminary decree only so far as the advocate's fee is concerned, *i.e.* by reducing the advocate's fees from Rs. 750 to Rs. 735 and by reducing the costs of the suit from Rs. 1,655-8 to Rs. 1,640-8 only, the plaintiff-respondent being entitled to the full amount of Court fee that he had to pay under the circumstances of the case and (3) by reduction of the aggregate of the principal, interest and costs due to the plaintiff from Rs. 22,759-8 to Rs. 21,882-8 only.

The final decree also must be amended accordingly. We can reopen the transactions and the decrees which

are based on them only for the purposes mentioned in section 13 of the Money-lenders' Act, 1945. So we cannot take advantage of their having been reopened and proceed to consider whether the decrees require any further amendment in the light of the Accrual of Interest (War-Time Adjustment) Act, 1947, as regards interest after the 8th December 1941. Besides, it has been held in the *Bank of Chettinad, Limited* v. *Chuah Bun Hock* (1) that section 3 of the Accrual of Interest (War-Time Adjustment) Act, 1947, does not apply to a decree.

The lower Court has allowed interest at the Court rate, *i.e.* at nine per cent per annum, from the 1st August 1942 up to the date of realization on the principal amount of Rs. 8,000 only and not on the aggregate amount of the principal, the interest and the costs. However, under Order 34, Rule 6 (*b*), of the Code of Civil Procedure, the lower Court had a discretion in the matter and there is no cross appeal or objection by plaintiff-respondent that the lower Court should have allowed subsequent interest on the said aggregate. So we do not propose to interfere with the lower Court's order as regards subsequent interest.

There will be no order as to the costs of this appeal as the appeal on the grounds set out in the memorandum of appeal has really failed, we have granted relief on a verbal application under the Money-lenders' Act, 1945, which came into force long after the passing of the final decree, the amount in respect of which we have granted relief is comparatively small and the final decree is to be amended only so far as the said amount is concerned.

U SAN MAUNG, J.—I agree.

(1) Civil Misc. No. 69 of 1947 of this Court.