Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Veerapa Chetty v. *Fackeeroodeen Adam Saw and others, from the Court of the Recorder of Moulmein; delivered 14th February* 1873.

Present:

LORD JUSTICE JAMES.
SIR BARNES PEACOCK.
LORD JUSTICE MELLISH.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is an appeal from the judgment of the Recorder of Moulmein, in a suit between Veerapa Chetty, the Plaintiff, and Fackeeroodeen Adam Saw, Sooliman Adam Saw, Asha Bee and Alleema Bee, the Defendants. It appears that Adam Saw, who was a Mahomedan resident at Moulmein, died on the 11th of October 1863. He left as sharers of his estate Kadir Amah, his mother, Alleema Bee, his widow, who is the fourth Respondent in this appeal, two sons, Fackeeroodeen, his elder son, and Sooliman, his second son, who are two of the Respondents, and three daughters, Fatimah Bee, his eldest daughter, Cawder Bee, his second daughter, who married Mahomed Ebrahim, and Asha Bee, his third daughter, who is the third Respondent in this appeal. It appears that on the 18th of October 1863 the widow obtained a certificate, under Act 27 of 1860, which authorised her to collect all debts due to the deceased, and also that on the 22nd September 1868 Pallaneappa Chetty, whose agent and representative in this suit the Appellant is, obtained a

decree against Allemah Bee, the widow, and Mahomed Ebrahim, her son-in-law, whom she had appointed as her agent to manage her affairs, for a sum of Rs. 37,425 13 annas, and costs of suit. Fatimah Bee, the eldest daughter, commenced a suit against her mother, and recovered a sum of Rs. 45,000 as her share of her father's estate, and that decree was settled. Cawder Bee, the second daughter, also commenced a suit against her mother, and obtained a decree for Rs. 40,000; that decree does not appear to have been settled. It does not appear upon what grounds Pallaneappa Chetty obtained the decree for Rs. 37,425; possibly, it may have been for moneys advanced for the benefit of the estate, but it simply appears that he obtained a decree against Alleema Bee, the widow, and her son-in-law Mahomed Ebrahim for a sum of Rs. 37,425 13 annas. On the 21st of February 1871, an agreement was entered into between the Plaintiff and three of the Defendants in this suit, upon which the Plaintiff is now suing. The widow, Alleema Bee, who was sued as a joint Defendant, did not join in the agreement of the 21st of February 1871, but she signed an agreement on the 24th of February 1871, upon which the question as to her liability arises.

The Plaintiff claims, as due to him in this suit, the principal sum of Rs. 64,777 5 annas and interest, and the total sum which he claims, subject to a deduction, is Rs. 74,245. That is made up of two sums of Rs. 39,575 and Rs. 28,800, and interest upon those two sums; and the question in this suit is whether he is entitled to recover the Rs. 39,575, and the Rs. 28,800, or either of them.

Before their Lordships proceed to consider the Plaintiff's right to recover those sums, it will be perhaps expedient that they should decide against whom they are to be recovered, if they are to be recovered at all. Now, as regards Alleema Bee, the agreement, which she signed, on the

24th of February 1871, was in the following terms:—"For and in consideration of the love "and affection I have for my children Fackeeroodeen Adam Saw, Sooliman Adam Saw, and "Asha Bee, I, the undersigned, do hereby agree "and pledge as security all or any right I may "possess, or whatever may be now remaining "belonging to me in the estate of the late Adam "Saw, deceased, unto S. A. Veerappa Chetty as "further security for a bond entered into between "S. A. Veerapa Chetty on the one part, and "Fackeeroodeen Adam Saw, Sooliman Adam "Saw, and Asha Bee, my children, on the other "part, dated the 21st of February 1871, until the "amount therein mentioned be duly liquidated." The Plaintiff treated Alleema Bee as having become a joint debtor with her two sons and her daughter for the total amount of Rs. 64,777 by virtue of that agreement. It appears to their Lordships, beyond all doubt, that Alleema Bee never intended to bind, and never did bind herself personally to pay any portion of that debt, but that she merely pledged her property as security for the performance of the agreement signed by her sons. Their Lordships, therefore, think that the suit was rightly dismissed as against Alleema Bee by the learned Recorder.

Then, as regards the daughter, Asha Bee, it was found by the learned Recorder that she was a minor when she signed that agreement.

Their Lordships see no reason to doubt the correctness of that finding, and independently of that it appears that Asha Bee was a mere child, even if she had arrived at the age of puberty, and there is not the slightest evidence to show that she understood the nature or effect of the document which she signed.

Under those circumstances the suit ought to be dismissed against Asha Bee. That leaves the two sons, Fackeeroodeen Adam Saw and Sooliman Adam Saw as the two Defendants against whom,

if at all, any portion of the sums are to be recovered.

Now, the first question is, whether the Plaintiff is entitled to recover the Rs. 39,575. The circumstances as regards that sum are these: The Plaintiff, on the 22nd of September 1867, obtained the decree before mentioned, against the widow and Mahomed Ebrahim, for the sum of Rs. 37,425 13 annas. The portions of the agreement which relate to this sum are the first and sixth clauses. By the first clause of the agreement Veerapa Chetty, the Plaintiff, bound himself to execute a valid assignment of the bond granted to him by Mahomed Ebrahim, Cawder Bee, and Fakeer Mahomed, on the 9th of February 1870, for Rs. 15,000. Their Lordships will have to refer to that document presently. It does not appear at the present moment what that is—but he agreed to execute a valid assignment of that bond "to the said Fakeroodeen Adam Saw, for "himself, and for the said Soliman Adam Saw, "and Asha Bee, and also to transfer to the said "Fackeroodeen Adam Saw, Sooliman Adam Saw, "and Asha Bee, all properties, monies, rights and "privileges taken by him in execution of his "decree in Civil Regular, No. 83 of 1868, being "the decree obtained against the said Alleema "Bee and Mahomed Ebrahim, or all that which "he may have acquired by private agreement in "satisfaction of the said decree." Then, by the sixth clause of the agreement, "Fackeeroodeen "Adam Saw, Sooliman Adam Saw, and Asha Bee "agreed and bound themselves to pay or cause "to be paid unto the said S. A. Veerapa Chetty, "or his assigns, the sum of rupees (39,575) thirty-"nine thousand five hundred and seventy-five, in "consideration of the obligations to be per-"formed by the said S. A. Veerapa Chetty, "according to para. 1, with interest thereon, "at the rate of rupees (9) nine per centum per "annum until duly liquidated."

The learned Recorder thought the Plaintiff was not entitled to recover that Rs. 39,575, on the ground that he could not, or had not executed a valid assignment of the bond granted to him by Mahomed Ebrahim and others.

Their Lordships will now consider what that bond was. The Plaintiff having recovered a decree against Ebrahim and Alleema Bee, an agreement was entered into between him and Ebrahim fixing the amount in respect of which Ebrahim was to be considered liable under the decree. It recited: That the said S. A. Pallaneappa Chetty, on the 22nd day of September 1868, obtained a decree in Civil Regular, No. 38 of 1868, of the Court of the Recorder of Moulmein, against the said Mahomed Ebrahim and Alleema Bee, for Rs. 37,425 : 13, with costs, and that the share or portion of the said sum of Rs. 37,425 : 13 payable, or which should be paid by the said Mahomed Ebrahim, then amounted to Rs. 15,000, and that the said S. A. Pallaneappa Chetty, had agreed by a certain deed of release, duly executed and delivered by the said S. A. Pallaneappa Chetty, on the day of the date of the said agreement, to release and discharge the said Mahomed Ebrahim from all liability under the said decree, on having the payment of the sum of Rs. 15,000 secured to him in manner therein-after mentioned, and then the said Ebrahim, Cawder Bee, and one Fakeer Mahomed agreed and bound themselves to pay the said sum of Rs. 15,000, and Cawder Bee, the wife of Ebrahim, assigned, as security for that payment, certain freehold premises and her share and interest in her father's estate. The learned Recorder thought that that bond was invalid, and consequently that no valid assignment of it could take place, inasmuch as the Plaintiff had not executed the release mentioned in the agreement. The words were: "And whereas "the said S. A. Pallaneappa Chetty hath agreed

" by a certain deed of release, duly executed and " delivered by the said S. A. Pallaneappa Chetty, " on the day of the date of these presents, to " release and discharge the said Mahomed Ebra- " him from all liability under the said decree." " It is admitted that that release was never executed, and the learned Recorder held that, in consequence, the bond was invalid. He said: " It is admitted that no such release as is recited " in this instrument was ever executed by the " Plaintiff, and it seems to me, therefore, that it " is entirely inoperative, notwithstanding that " at a subsequent date, viz., on the 3rd March " 1871, the Plaintiff entered up satisfaction on " the record."

Now, the question is, whether the Defendants are liable to pay the Rs. 39,575 by virtue of the sixth section of their agreement. By that article, they agreed, in consideration of the obligations to be performed by the Plaintiff according to paragraph 1, to pay the Rs. 39,575, which, in all probability, was the amount of the original judgment obtained against Alleema Bee and Ebrahim with interest; but it is not very material whether that was so or not, for the Defendants undertook to pay that Rs. 39,575 in consideration of the obligations to be performed by Veerapa Chetty.

It may be remarked that the Defendants, Fakoorodeen Adam Saw and Sooliman Adam Saw, had previously given a promissory note for Rs. 40,000 on account of the decree against Aleema Bee and Mahomed Ebrahim, which note was given up to the two last mentioned Defendants in pursuance of the agreement. *See* Record, p. 17, line 39, and page 38.

Then, as regards the bond, he handed it over to the Defendants, and on the 3rd March 1871 he entered up satisfaction of the Judgment therein mentioned. The other portion of the agreement was that he would assign to the Defendants "all properties, monies,

" rights, and privileges taken by him in execution " of his decree in Civil Regular, No. 83 of 1868, " obtained against the said Alleema Bee and " Mahomed Ebrahim, or all that which he may " have acquired by private agreement." In performance of that part of the agreement he handed over to them the certificates of title which he had obtained under the execution against Alleema Bee. He thus performed substantially the agreements on his part contained in the first article, and consequently, it appears to their Lordships that the two male Defendants are liable to pay Rs. 39,575 under the terms of the sixth clause of the agreement. The sixth clause is not "in " consideration of the performance of the obli- " gations," but "in consideration of the obliga- " tions;" and even if there was a breach of the agreement in assigning the bond, it would only go to a part of the consideration. There were other considerations for the Defendants agreement, viz., the transferring to them all the properties which he had obtained by virtue of any execution against Alleema Bee, &c., and he did substantially transfer them.

Their Lordships, therefore, think the Plaintiff entitled to recover the Rs. 39,575 under the terms of the sixth clause of the agreement, and that whether the case be determined according to the law of England or according to the Mahomedan law.

If the Plaintiff has broken his part of the agreement in any respect, the Defendants have their remedy against him; but the breach, if any, on his part of one portion of the agreement constitutes no defence for the breach by the Defendants of their part of the agreement.

The next question is, whether the Plaintiff is entitled to recover against the Defendants the Rs. 28,800? That sum may be divided into two portions. It consists of Rs. 15,500 and Rs. 13,300. As to the Rs. 15,500, the liability arose in this way: Kadir Amah, the mother, instituted a suit for the administration of the

estate of Adam Saw her son, and the second clause of the agreement says,—"The said Kadir "Amah agrees to receive," but Kadir Amah was no party to the agreement. It was in substance, a recital that Kadir Amah had agreed to receive in full of all demands against the said estate, and against the other parties to the agreement, the sum of rupees fifteen thousand and five hundred, and to withdraw the said suit, and an agreement by the said S. A. Veerapa Chetty to advance unto Fackeroodeen Adam Saw, Sooliman Adam Saw, and Asha Bee the sum of rupees fifteen thousand five hundred, for the purpose of paying off the said Kadir Amah.

Then the seventh clause of the agreement is:—"The said Fackeroodeen Adam Saw, "Sooliman Adam Saw, and Asha Bee, do "hereby agree and bind themselves to repay "or cause to be repaid unto the said S. A. "Vecrapa Chetty, the advance made as men- "tioned in paragraph 2 of rupees (15,500) fifteen "thousand and five hundred, the receipt of "which they do hereby acknowledge." The question is, did Veerapa Chetty really advance that money within the meaning of the agreement? Now, it appears that Mahomed Ebrahim was authorised by a general power of attorney to manage the affairs of Kadir Amah and settle her administration suit; and it appears that he did agree, on her behalf, to settle the administration suit on payment of Rs. 15,500, and the Defendants, wanting the money to pay that Rs. 15,500, applied to Veerapa Chetty to advance the money.

The transaction was this:—He gave them a promissory note for Rs. 15,500; they endorsed that note to Mahomed Ebrahim on behalf of Kadir Amah, the mother, and instead of paying that note to the mother, or giving her the benefit of it, he gave it back to the Plaintiff in discharge of a debt of his own. Now, Kadir Amah is no party to this suit, nor is Mahomed Ebrahim; therefore, their Lordships

do not intend to express any opinion as to the rights or liabilities of those parties. They have arrived at this opinion, that the transaction of handing over the note to the Defendants for Rs. 15,500, and taking that note back again from the agent of the mother, with a knowledge of all the facts, in discharge of his own debt, did not amount to an advance of the Rs. 15,500.

Under these circumstances their Lordships are of opinion that the Plaintiff is not entitled to recover that Rs. 15,500 from the Defendants, inasmuch as the Plaintiff never advanced that sum.

The other portion of the Rs. 28,800 is Rs. 13,300; Rs. 3,300 of that amount was advanced to the Defendants, prior to the date of the agreement, upon a promissory note, which was given up when the agreement was signed. See Record, p. 38, and p. 17, line 39; and the remaining portion of the amount, viz., Rs. 10,000, were advanced subsequently. Their Lordships are not acquainted with the date of the last-mentioned advance. All that is stated is that he advanced that Rs. 10,000. The Recorder, in ascertaining the amount of the advances to the family, arrived at the same amount of Rs. 13,300.

Their Lordships think there is no doubt, upon the evidence, that that Rs. 13,300 was advanced, and consequently the Defendants are liable to repay it.

The next question is, whether the Plaintiff is entitled to recover any interest, and at what rate, upon those sums? As to the Rs. 39,575 the Defendants stipulated to pay interest upon that amount at the rate of nine per cent. per annum. Their Lordships are of opinion, therefore, that the Plaintiff is entitled to recover interest at that rate upon that amount from the date of the agreement up to the date of the commencement of the suit.

There is an Act in India which requires that where a particular rate is stipulated for as interest, the Court is bound to give that rate.

It was stipulated by the 8th article of the agreement that interest on the Rs. 28,800 was to be paid at the rate of 18 per cent. Therefore, upon the Rs. 3,300 part of that amount which is allowed, interest will run at that rate from the date of the agreement to the date of the commencement of the suit. No interest on the Rs. 10,000, as the date of the advance was not proved and is therefore unknown.

From the above amounts to be awarded to the Plaintiffs the Defendants are entitled to a deduction Rs. 11,859 : 7 annas. The Plaintiff in his plaint gives credit for Rs. 9,468 : 1 : 3 which is made up of the sum of Rs. 11,859 : 7, minus the sum of Rs. 2,391 : 5 : 9, which he deducts from it. The learned Recorder, however, disallowed the deduction, and there is nothing to induce their Lordships to think that the Recorder was in error in that respect.

Their Lordships see no evidence to prove that the agreement of the 21st February 1871 was abandoned. Upon the whole, their Lordships will humbly recommend Her Majesty to affirm the decree of the Recorder, so far as it relates to the Defendants Asha Bee and Aleema Bee, and to reverse it as to the other two Defendants, Fakeeroodeen Adam Saw and Sooliman Adam Saw, and to order and decree that they do pay to the Plaintiff the sum of (Rs. 39,575) thirty nine thousand five hundred and seventy five rupees, with interest thereon at the rate of 9 per cent. per annum from the date of the said agreement of the 21st February 1871 to the 24th October 1871, the date of the commencement of the suit; and also the sum of Rs. 13,300, with interest on Rs. 3,300, part thereof, at the rate of 18 per cent. per annum from the date of the said agreement to the date of the commencement of the suit, subject to a deduction of Rs. 11,859 : 7 annas, together with interest at the rate of 6 per cent. per annum on the sum Rs. 41,018 : 9 annas from the commencement of the suit to the date of the decree in this Appeal, and that the Plain-

tiff recover his costs in the Lower Court against the two Defendants last named in proportion to the amount recovered, but not the costs of this Appeal. The decree in Appeal to carry interest at 6 per cent. on the said sum of Rs. 41,015 : 9 annas, being the balance of the two principal sums of Rs. 39,575 and Rs. 13,300, after deducting therefrom the said sum of Rs. 11,859 : 7 annas from the date of the decree in this Appeal to the date of realization.