Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

1909.
March 11.

CRACKLAW *v.* CLEMENTS *et al.*

D. C. Kandy, 18,898.

Appropriation of payments — Payment of interest—Appropriation—Mortgage debt—Unsecured debt.

A mortgage bond was dated July 15, 1904 ; on October 3, 1904, and January 16, 1905, the mortgagor paid two sums of Rs. 90 each for the interest then due on the bond ; and on May 6, 1905, he made a payment of Rs. 96, which he wished to place against the interest, but which the mortgagee insisted on placing against an unsecured debt due to him from the mortgagor. Afterwards the mortgagor made three other payments, the last of which was in April, 1906. The mortgagee deposed that about October, 1907, the mortgagor agreed to allow him to appropriate all the payments which he had made towards the amount due by him on the unsecured debt.

Held, that all the payments, before the arrangement of October, 1907, should be credited to the more onerous debt, viz., the mortgage debt.

Held, that when part of a mortgage debt due on a bond for a definite and certain sum had been paid off, the parties could not afterwards agree that the payment should be cancelled, because such an agreement would be in contravention of the Stamp Laws.

Held, further, that this principle should be applied as regards payment of interest as well.

APPEAL by the second defendant from a judgment of the District Judge of Kandy. The facts material to the report sufficiently appear in the judgment of the Chief Justice.

Van Langenberg (with him *Bawa*), for the second defendant, appellant.

F. J. de Saram, for the plaintiff, respondent.

Cur. adv. vult.

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March 11, 1909. HUTCHINSON C.J.—

This is an appeal by the second defendant. The action was brought by the mortgagee on a mortgage bond: the first defendant is a mortgagor and the second defendant is a purchaser of the mortgaged property subsequent to the mortgage. The only question now is as to the amount due for interest on the mortgage; the plaintiff claims, and the District Court has awarded him, interest from the date of the bond, but the appellant says that certain payments which were made by the mortgagor to the mortgagee ought to be credited to him as on account of the interest on the mortgage.

The bond is dated July 15, 1904. It is for the penal sum of Rs. 7,200 to secure the repayment of Rs. 3,600 and interest, and is stamped as a bond to secure Rs. 3,600. On October 3, 1904, and January 16, 1905, the mortgagor paid two sums of Rs. 90 each for the interest then due on the bond, and on May 6, 1905, he made a payment of Rs. 96, which he wished to place against the interest, but which the plaintiff insisted on placing against an unsecured debt due to him from the mortgagor. Afterwards the mortgagor made three other payments, the last of which was in April, 1906, and which he did not appropriate, but which the mortgagee appropriated to the unsecured debt. These payments, which amount together to Rs. 762, are those which the second defendant says should be credited as against the interest on the bond. The second defendant bought the mortgaged property in November, 1907, at a Fiscal's sale in execution against the mortgagor. The mortgagor admitted, and consented to judgment against him for the full amount of the plaintiff's claim.

The plaintiff deposed that about September or October, 1907, the mortgagor agreed to allow him to appropriate all the payments which he had made towards the amount due by him on the promissory note (*i.e.*, the unsecured debt), that he had threatened to put the bond in suit unless the mortgagor so agreed, and that the latter did so agree. The District Judge believed that the parties did make that arrangement, and I see no reason to doubt it.

The appellant says, in the first place, that there was no proof of the existence of the unsecured debt, because the promissory notes were not produced. The plaintiff, however, was not suing on the notes, and there was no reason why they should be produced, if the Court was satisfied otherwise of the existence of the debt.

The appellant also contends that the arrangement made in 1907 between the mortgagor and the mortgagee was illegal; that when part of a mortgage debt due on a bond for a definite and certain sum has been paid off, the parties cannot afterwards agree that the payment shall be cancelled, or, which comes to the same thing, that the mortgage shall stand as security for the balance of

the original debt and also for a fresh advance of the same amount as that which was paid off, because such an agreement would be in contravention of the Stamp Laws. That objection is sound as regards the principal debt, and I think that it is equally sound as regards the interest, and that the first two payments of Rs. 90 each must be set against the interest on the bond. As to the other payments, the first one, Rs. 96, was made by the mortgagor to a bank to the mortgagee's credit; "the plaintiff," he says, "wished me to place it to his account as against the interest due on the bond, but I refused to do so, and placed it to the credit of the moneys advanced by me to him independently of the bond." The next payment, Rs. 91, was also made to the mortgagee's account at the bank; it does not appear how the last two, one Rs. 185 and the other Rs. 210, were made, or that the mortgagor made any appropriation of any of the three last payments at the time of payment. The mortgagee says that he credited the mortgagor's account on the promissory notes with them, but his books do not show that he did so; the payments are all entered in his ledger on a page which is headed with the number and date of the mortgage bond, but he says that his intention was to credit the payments against the money due on the notes. It does not appear that there was any entry relating to the notes either in the ledger or in any other book. So that, before the arrangement of September or October, 1907, all these payments either were or ought to have been credited to the more onerous debt, and that was the debt on the bond. And the mortgagee seems to have recognized this when he induced the mortgagor in 1907 to agree that they should be credited to the unsecured debt.

The result is, in my opinion, that the decree of the District Court should be amended by reducing by Rs. 762 the amount for default, in payment of which the mortgaged premises are directed to be sold. The decree so far as regards the first defendant will stand, but after the words "in default of payment of the said amount, interest, and costs within such time," there should be added the words "less the sum of Rs. 762 (being the amount by which as between the plaintiff and the second defendant the interest due on the mortgage ought to be reduced)."

The decree as to costs should stand. The plaintiff should pay the appellant's costs of this appeal.

MIDDLETON, J.—I concur.

Decree varied.