

APPELLATE CIVIL.*Before Newbould and Panton JJ.*

ASHRAF ALI

v.

MAKBUL AHMED.*

1922

*March 22.**Contract—Contract Act (IX of 1872), s. 74.*

Where there is no suggestion that the mortgagor acted under any undue influence, the fact that the result of the breach of his contract has been that he has to pay nearly double the amount advanced is in itself no sufficient reason for holding that the contract is not binding.

SECOND APPEAL by Ashraf Ali and others, the plaintiffs.

This appeal arose out of a suit for enforcing a mortgage. The principal amount was Rs. 500. The money was repayable in grains of 172 maunds of paddy in two successive years. In default the price of paddy was to be charged at Rs. 3 per maund. The suit was for the recovery of Rs. 1,032 as principal and interest. The defendant contended that the stipulation was penal, hard and unconscionable. The Court of first instance allowed 15 per cent. per annum as interest. On appeal by the plaintiffs, the Additional District Judge dismissed the appeal, holding that plaintiffs admittedly could not take interest as good Mahomedans, but had charged more than double the amount lent for 20 months, that the stipulation in the contract was in fact for payment of damages in case of default of payment, the principal only not being

* Appeal from Appellate Decree, No. 358 of 1920, against the decree of Amrita Lal Mukerjee, Additional District Judge of Noakhali, dated Oct. 29, 1919, affirming the decree of D. K. Roy, Subordinate Judge of that district, dated March 26, 1918.

repayable, and that the contract was governed by section 74 of the Indian Contract Act and was hard and unconscionable, in spite of the plaintiffs' profession to the effect that they were good Mahomedans viewing interest as a prohibited thing. Thereupon the plaintiffs appealed to the High Court.

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Manlvi Nurul Huq, for the appellants, contended that the stipulation was not penal and that the Courts below should have allowed interest or damage at the stipulated rate till the expiry of six months after the final disposal of the suit. The price of paddy at the time of the suit was certainly above Rs. 3 a maund: see *Nait Ram v. Shib Dat* (1).

No one appeared for the respondent.

NEWBOULD AND PANTON JJ. This appeal arises out of a suit to recover the sum of Rs. 1,032 to be realized from certain mortgaged property. The contract sued on between the parties was to the following effect. The plaintiffs advanced a sum of Rs. 500 and for this the defendant undertook to repay 172 maunds of paddy in the year 1322 and the same amount on the following year in the month of Falgoun in each year. In default of delivering this paddy the price was to be charged at Rs. 3 per maund. Both the lower Courts have given the plaintiffs a partial decree. The lower Appellate Court has held that the stipulation was penal under section 74 of the Indian Contract Act and has confirmed the decree of the lower Court allowing 15 per cent. per annum interest.

In this case there is no suggestion that the defendant acted under any undue influence and the fact that the result of the breach of his contract has been

(1) (1882) I. L. R. 5 All. 238.

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that he has to pay nearly double the amount advanced is in itself no sufficient reason for holding that the contract is not binding. So far as the original contract is concerned to deliver paddy on the due dates in lieu of the sum advanced there is nothing which could make the provisions of section 74 of the Contract Act applicable; nor do we think that that section can be applied to the condition that the price of paddy was to be charged at Rs. 3 per maund. The arrangement as to the price of paddy fixed some time beforehand which is not on the face of it excessive cannot be held to be an agreement by way of penalty. It was to the interest of the parties that a definite rate should be fixed and it might have been to the advantage of the defendant if the paddy at the time of payment was selling at a higher rate to be able to pay cash instead of paddy itself. We are unable to agree that this stipulation was in the nature of penalty. We can see no reason why the defendant should not be bound by the conditions of the contract into which he freely entered.

We accordingly allow this appeal and modify the decrees of both the lower Courts and grant the plaintiffs the usual mortgage decree for the full amount of their claim. The defendant shall pay the plaintiffs-appellants' costs in all Courts. Interest will be calculated at the rate of six per cent. per annum from the date of the suit until realization. The period of redemption will be six months from the date of the decree of this Court.

S. M.

Appeal allowed.