ORIGINAL CIVIL.

Before Rankin J.

1922

Jan. 16.

KADER BUKSH HAZIR BUKSH

v.

SHAIK SERAJUDDIN.*

Hundi—Interest—Verbal agreement—Suit under O. XXXVII of the Civil Procedure Code (Act V of 1908).

In a suit, instituted under O. XXXVII of the Code of Civil Procedure (Act V of 1908) and where no leave to defend was obtained a verbal agreement to pay interest at 18 per cent. was alleged in the plaint and the amount mentioned in the summons included interest calculated at that rate :—

Held, that the plaintiff was entitled to get interest at 6 per cent. only, from the respective due dates and interest at 6 per cent. on the decree.

THIS was a suit on five different hundies of Rs. 5,000 each and was instituted under O. XXXVII of the Code of Civil Procedure. No mention of any interest was made on the hundies themselves but in the plaint an allegation was made that it was agreed that the amounts of the hundies would carry interest at 18 per cent. per annum. The amount claimed in the suit and also mentioned in the summons was Rs. 27,325 representing Rs. 25,000 for principal and Rs. 2,325 for interest calculated at 18 per cent. per annum. No leave to defend was obtained and the suit came up for hearing *ex parte*.

Mr. H. K. Mitra, for the plaintiff firm. It is not the practice to have interest mentioned in hundies. Agreement to pay interest is mentioned in paragraph 5 of the plaint, and as no leave to defend has been obtained this must be deemed as admitted.

* Original Civil Suit No. 3091 of 1921.

Code of Civil Procedure (Act V of 1908), O. XXXVII, r. 2. The new rule does not state where the interest should be specified. By reason of the change in wording in the new rule, the decision in *Bhupati Ram* v. *Sourendra Mohun Tagore* (1) is no longer the law. Interest can be specified either in the instrument itself or in a separate memorandum or in the summons issued. Iyengar and Adiga's Negotiable Instruments Act (1909 Edn.) p. 495.

RANKIN J.: This suit is brought under O. XXXVII of the Code and no leave to defend has been obtained. It is now before me for final disposal as an undefended cause.

The claim is upon five promissory notes expressed in the common English form. Each note is for five thousand rupees and all are silent as to interest. The suit is between the original parties to the notes, the defendant being the maker and the plaintiffs the payees.

Paragraph 5 of the plaint is as follows:—"It was "agreed at the time of the treaty for the said hundies "that the amounts thereof would carry interest at the "rate of 18 per cent. per annum from the respective "due dates thereof until realization."

The writ of summons gives notice that in default of defence the plaintiffs will be entitled to decree "for any sum not exceeding the sum of Rs. 27,325" and costs. It makes no express mention of interest, but the figure Rs. 27,325 is apparently calculated at 18 per cent.

The question is whether decree should be made as regards interest on the basis of 18 per cent. Counsel for the plaintiffs contends that it should, and relies in particular upon the words in O. XXXVII, r. 2, "the

(1) (1903) I. L. R. 30 Calc. 446.

1922

KADER BUKSH HAZIR BUKSH v. SHAIK SERAJUDDIN.

RANKIN J.

allegations in the plaint shall be deemed to be admitted."

These words are comparatively new and were doubtless intended to meet difficulties appearing from cases previously decided. I must, however, take the Code as amended and construe it upon its face. I cannot assume because a given thing could not have been done before the amendment, that the amendment was intended to confer power to do it.

Order XXXVII is applicable only to suits upon instruments that by their character are, potentially at all events, negotiable. The words of r. 2 are "all suits upon bills of exchange, hundies or promissory notes." There can be no question that these words govern every other provision of the Order and that claims upon other causes of action cannot be joined with claims of the kind specified so as to extend the operation of the Order beyond the limits so set.

There is, moreover, a definite meaning to be given to the phrase "suits upon bills of exchange." A suit lies upon a bill of exchange: the bill is not merely a piece of evidence which may be of value in support of a claim for money lent or for the price of goods. The provision of r. 3 shows that the character of the issues involved in suits upon negotiable instruments is a consideration most directly influencing the grant of a summary process for such suits. The provision that the allegations in the plaint shall be deemed to be admitted is very necessary in suits strictly "upon bills of exchange"; as presentment, dishonour, and many other facts may be involved. The history of the decisions prior to the insertion of these words makes this very clear.

The allegation as to an agreement for interest at 18 per cent. is not an allegation of a written agreement intended by the parties to be part of the promise

contained in the notes. It is apparently an oral agreement and *prima facie* a promissory note is a formal document intended to express the whole bargain. An oral agreement for interest made "at the time of the treaty" is not only highly suspicious, but is *prima facie* inadmissible in evidence. (Evidence Act, s. 92.) If admissible, it is so, entirely by virtue of its separateness, and because it is not a part of the bargain or promise expressed in the note: otherwise it adds to its terms.

It is, in my opinion, important to take care that summary procedure, necessary and safe when applied to mercantile instruments, is not allowed for the purpose of enforcing alleged verbal agreements of a collateral or "separate" character. If it is, the present case shows that, however, hazy, suspicious or contrary to the rules of evidence such allegations may be, the Court will be helpless to prevent injustice. In my judgment, the plaintiffs cannot in this suit recover 18 per cent. upon any cause of action within O. XXXVII and paragraph 5 of the plaint can and should be ignored.

Having regard to the claim notified by the writ of summons in this case, I think I can allow interest at the statutory rate of six per cent. until to-day in respect of each note, commencing respectively on the 19th and 29th April, 10th, 20th and 30th May 1921. This ought to be plain, but section 80 of the Negotiable Instruments Act seems to me to confuse, very unhappily, two entirely different things (*i*) what the presumed promise as to interest is (*ii*) what under O. XXXVII are to be taken as the facts and what relief can be given thereupon. I do not think it means that upon bringing a suit under O. XXXVII the plaintiff loses his substantive right to six per cent. Whether he can recover it in that form of suit will

1922

KADER BUKSH HAZIR BUKSH v. SHAIK SERAJUDDIN.

RANKIN J.

depend upon his plaint and summons. In this case no rate of interest is specified in the summons, but I am giving decree in all for less than the sum asked.

I do not say that on the face of the Code (s. 34, O. XXXVII, r. 2) the matter is at all plain, but my view is that it is open to me to give the usual interest after decree upon the aggregate amount adjudged. It would indeed be an extraordinary intention that mercantile instruments should be excepted from this discretionary power in cases where there is no defence. This consideration ought, in my opinion, to outweigh any inference from the fact that O. XXXVII is silent upon the question although precise as to interest before decree. As regards interest after decree O. XXXVII cases have no speciality. This is putting the position at its lowest; it is more reasonable therefore to attribute the silence of the Order to this fact than to infer a negative intention.

Attorney for the plaintiff firm : *P. C. Ghose.*

N. G.