## APPELLATE CIVIL.

*Before D. N. Mitter and Patterson JJ.*

# BENGAL NAGPUR RAILWAY COMPANY, LIMITED

*v.*

# RATANJI RAMJI.*

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*April* 16, 18, 19, 20, 26, 27, 30; *May* 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 23; *July* 3.

*Contract—Abandonment of original agreement—Test to determine whether variation or rescission—Work done after rescission, if and how to be paid for—Interest up to the date of the suit and* pendente lite, *if payable when no contract express or implied—Damages for detention of debt—Indian Contract Act (IX of 1872), ss. 70, 73.*

Whether there has been a mere variation of terms or a rescission of contract depends upon the facts of each case. In the case of variation, there are no such executory clauses in the second arrangement as would enable one to sue upon that alone if the first did not exist; in the case of rescission, one could sue on the second arrangement alone and the first contract is got rid of either by express words to that effect, or because of the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed.

When the old contract is abandoned by express or implied consent of parties and no new agreement is substituted for it, but the party who was required under the contract to do a work actually does it, and the benefit of it is enjoyed by the other party, the latter is bound to pay for the work at reasonable or market rate under section 73 of the Indian Contract Act.

*Morris* v. *Baron and Company* (1) followed.

Interest depends on contract, express or implied, or on some rule of law allowing it, and it can be claimed as damages for unlawful detention of a debt under section 73 of the Indian Contract Act.

The rate of interest allowed as damages for detention of a debt depends upon the circumstances of each case and it can be allowed both for the period before suit and *pendente lite*.

*Pattinson* v. *Bindhya Debi* (2) and the dictum of Walmsley J. in *Prosonnomoyi Ghoshani* v. *Gopal Lal Sinha* (3) dissented from.

*Chajmal Das* v. *Brij Bhukan Lal* (4) followed.

*Kalyan Das* v. *Maqbul Ahmad* (5) explained and distinguished.

*Cook* v. *Fowler* (6) referred to.

*Appeal from Original Decree, No. 162 of 1931, with Cross-objection, against the decree of Upendrachandra Ghosh and order of Praphullachandra Guha, First Additional Subordinate Judges of 24-*Parganás*, dated March 14, and May 12, 1931, respectively.

(1) [1918] A. C. 1.
(2) (1932) I. L. R. 12 Pat. 216.
(3) (1919) 31 C. L. J. 348.
(4) (1895) I. L. R. 17 All. 511; L. R. 22 I. A. 199.
(5) (1918) I. L. R. 40 All. 497.
(6) (1874) L. R. 7 H. L. 27.

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APPEAL FROM ORIGINAL DECREE, by the defendant.

The material facts of the case and the arguments on the particular points are sufficiently stated in the judgment.

*Bagram, Ambikapada Chaudhuri* and *Pannalal Chatterji* for the appellant.

*Roopendrakumar Mitra, Pramathanath Mitra* and *Nripalchandra Ray Chaudhuri* for the respondents.

*Cur. adv. vult.*

MITTER J. The action, which has given rise to this appeal, was brought by the plaintiffs, now respondents, to recover Rs. 1,66,493-4-0 from Bengal Nagpur Railway Company on account of price of work done by the plaintiffs as members of a joint *Mitâkshará* family in a certain section of the construction known as the Amdâ-Jâmdâ Branch.

The case stated in the plaint is that the defendants offered to the father of the plaintiffs, Ramji Madhoji, who is now dead, contract work in the said construction, subject to his signing certain schedules, which are usual printed forms of agreement; that the plaintiffs' father signed the schedules for earthwork, bridgework and miscellaneous work and delivered the schedules to the District Engineer of Chaibasa; that after carrying on the works for two or three months, plaintiffs' father discovered the work to be unusually difficult and expensive and the scheduled rates to be grossly inadequate and the conditions contained in the schedule were hard and unjust; that the contractors expressed their inability to work at the rates agreed upon and pressed for cancellation of the contract and for settlement of higher rates and better conditions; that this led to a discussion and the result of the discussion was that the defendant company had abandoned the plaintiffs' schedules and had prepared new schedules containing higher rates, which, however, were not accepted by the contractor (plaintiffs) and further that the defendants proposed to leave the question

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of rates open with a view to ascertain later on an estimate of the contractors' expenses after sufficient progress of the work and that the defendant company assured the plaintiffs of their well-established policy to pay final rates at which contractors can make a profit and that reasonable rates will be paid; that, on the faith of these assurances, the plaintiffs went on with the work and completed the same; that, during the progress of the work, the contractors kept the defendant company duly informed of the difficulties and the costs from time to time, so that these might be taken into consideration at the final determination of the rates; that, although attempts were made by the defendant company as well as by the plaintiffs to settle final rates in advance, the attempt failed but the work was not stopped on the mutual understanding that the final rates would be ascertained on the completion of the work; that the work was completed in December, 1924, but, notwithstanding attempts to settle the rates, no agreement was reached; that the company, while admitting its liability to pay reasonable rates, maintained that the rates worked up by the District Engineer in the measurement book were sufficient. In paragraph 8 of the plaint, the plaintiffs state their main objections to the rates worked up by the District Engineer as aforesaid. The plaintiffs admit that, in pursuance of an oral arrangement, the contractor was supplied by the defendants with explosives free of charge for blasting purposes and, consequently, the plaintiffs' rates for the cuttings are based on their expenses and do not include the cost of explosives. The plaintiffs further state that, in spite of repeated demands, the defendant company failed to pay their dues and, as the defendant company were having the benefit of plaintiffs' money, the plaintiffs were entitled to get interest at 1 per cent. per month since July, 1925. The plaintiffs, accordingly, prayed for the following reliefs:—*viz.*, a decree for—

(*a*) Rs. 1,26,863-8-0 or any other amount found due as the value of the work done by plaintiff for defendant.

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(*b*) Rs. 40,629-12-0 or any other amount of interest adjudged due.

(*c*) Further interest for the period of the suit, until realisation, on the total claim, Rs. 1,67,493-4-0.

(*d*) Costs of the suit.

(*e*) Other reliefs.

The plaint gives an account of the work done and charges for the same in three schedules. Schedule A is the final bill for the earthwork, schedule B is the final bill for the bridgework and the schedule C is the final bill for miscellaneous work. Schedule D of the plaint, after giving the total value of the several kinds of work done and after making deductions on account of previous payments and royalty and after charging interest at 1 per cent. per month, lays the total claim at Rs. 1,67,493-4 only.

Several defences to the suit have been taken by the defendant railway company, but we will notice only those around which controversy has centred in the present appeal. Such defences are: (1) that the suit is barred by limitation, as the works, in respect of which the suit has been instituted, were completed more than three years before the institution of the suit; (2) that the schedules of rates for earthwork, bridgework and miscellaneous works form the foundations of the contract between the parties and the defendant relies on the schedule of rates and the terms and conditions appearing therein; (3) that the schedules of rates were not liable to variation as alleged by the plaintiffs; (4) that the plaintiffs pressed for some increases as a matter of favour and pointed out some difficulties in view of which certain increase of rates were sanctioned by the Chief Engineer as a matter of favour and were entered in the schedules; (5) that the defendant did not abandon the contractor's schedules, but increased certain rates, as permitted by condition No. 15 of the schedules; that as the

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contractor did not agree to or initial the enhanced rates as entered in the schedules, the plaintiffs are bound by the lower rates of the original schedules, that the Assistant Engineer had no authority to make any new proposal with regard to the rates or give any assurance in respect thereof without the prior sanction of the District and Chief Engineers who alone have the right to alter them; (6) that the defendant never admitted its liability to pay any rates other than those entered in the signed schedules; the defendant states that the rates granted by the defendant are fair and reasonable rates; that, without admitting the plaintiff's right to reopen the question of rates, the defendant submits, with regard to clauses (*b*), (*c*), (*d*) and (*e*) of paragraph 8 of the plaint as follows :—

(*b*) that the defendant railway company submit that the schedule rates, as voluntarily amended by the defendant together with 25 per cent. jungle allowance, are just and adequate;

(*c*) that over and above the jungle allowance, a mileage allowance of annas six per 100 cft. was allowed on earthwork on this contractor's length. This was the highest mileage allowance on the district. In the case of bridgework, where special rates have not been allowed, Rs. 2 per cft. special mileage allowance has been included in masonry rate and annas twelve per 100 cft. for concrete. That the plaintiffs are not entitled to get what they claim under this head;

(*d*) it is submitted that 25 per cent. is a fair allowance and ought not to be increased;

(*e*) that special rates higher than the amended scheduled rates with mileage and jungle allowance were approved by the Chief Engineer. These rates are on average about twice those originally agreed to in the printed schedules. That special road

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to the contractor's quarry was constructed by the railway and he was given other advantages. The defendant denies the allegations made in sub-paragraph (*e*) of the plaint;

(7) that the plaintiffs are not entitled to reopen the question of the said rates and to have fresh rates assessed, that, without giving up this position but strongly relying upon it, the defendant makes the following submission with regard to clauses (*a*), (*b*) and (*c*) of paragraph 9 of the plaint:—

(*a*) that the principle of the agreed schedule is that the work should be done for an agreed price and not on an expenditure and commission basis. The contractor cannot claim the latter in view of the agreement signed by him;

(*b*) that the rates paid to this contractor are in no way less than those paid to other contractors working near him;

(*c*) that the District Engineer is the sole judge of the classifications. The plaintiffs are not entitled to what they call expert and experienced estimate of rates and expenses;

(8) that with regard to the allegations made in paragraph 16 of the plaint, the defendant submits, that it is not true, that there was any oral agreement between the parties in pursuance of which the contractor was supplied by the defendant with explosives free of charges for blasting purposes, and that no account of such supply to a particular contarctor was kept by the contractor or the defendant; on the contrary, it was agreed that the contractor would pay for such explosives and that the cost of explosives would be deducted from the amounts due to the contractor and that in the account bills for this contractor the cost of explosives was as a matter of fact recovered: the defendant denies that the contractors'

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rates for the cuttings are based on their expenses and do not include the cost of explosives; (9) that the plaintiffs are not entitled to any interest as claimed by them and that in any case the interest claimed is excessive.

* * * * *

On the 10th of January, 1929, the plaintiffs put in an application, supported by an affidavit, for local investigation and, on the 12th February, they supplemented that petition. On the 16th of February, the court allowed the application of the plaintiffs and directed that a commissioner be appointed to assess the fair and reasonable rates for the works done, remarking that such an investigation was necessary, it being the plaintiffs' case, in the pleadings, that the contract known as the schedule of rates was abandoned by the defendant, who agreed to pay at reasonable and fair rates and remarking also that expert opinion was necessary for such investigation. The commissioner submitted a very long report, covering about 250 pages of volume 2 of the paper book. This report was filed on the 15th of August, 1930. On the 8th of January, 1931, both sides filed petitions of objection to the commissioners' report. The learned Subordinate Judge, after taking oral and documentary evidence, has granted a partial decree to the plaintiffs for the sum of Rs. 1,51,846 and it is against this decree that the present appeal has been brought by the Bengal-Nagpur Railway Company, Ltd.

[After dealing with the evidence the judgment proceeded as follows] :—

There being the abandonment of the old rates and no settlement of any new rates, let us consider what the true legal position is, keeping in view the fact that the railway company has got the benefit of the work of the contractor and the further fact that the contractor did not do the work gratuitously. We are of opinion that, in the circumstances, any actual transaction between the parties gave rise to the ordinary legal rights and, in the absence of any settlement

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of any rates, the plaintiffs are entitled to get reasonable rates or market rates. Section 70 of the Indian Contract Act may be applied to the present case. That section runs as follows :—

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered.

Reference may be made in this connection to *Rose and Frank Company* v. *J. R. Crompton and Brothers, Limited* (1), where the facts are stated as follows :— By successive arrangements, made, before 1913, between an American firm and an English company, the American firm were constituted sole agents for the sale, in the United States and Canada, of tissues for carbonising paper supplied by the English company. The greater part of these tissues was manufactured for this English company by another English company. By an arrangement, made between the American firm and both English companies in 1913, the English companies expressed their willingness that the existing arrangements with the American firm, which were then for one year only, should be continued on the same lines for three years and so on for further periods of three years, subject to six months' notice. This document, after setting out the understanding between the parties, including several modifications of the previous arrangements, proceeded as follows :—

> This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they honorably pledge themselves, with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation. This is referred to as the "honorable pledge" clause.

Disputes having arisen between the parties, the English companies determined this arrangement without notice. Before the relations between the parties were broken off, the American firm had given and the

(1) [1925] A. C. 445, 455.

first mentioned English company had accepted certain orders for goods. In an action by the American firm for breach of contract and for non-delivery of goods—it was held in the above state of facts that the arrangement of 1913 was not a legally binding contract; that, at the date of the arrangement of 1913, all previous agreements were determined by mutual consent, but that the orders given and accepted constituted enforceable contracts of sale. The following passage in the speech of Lord Phillimore is pertinent to the present controversy :—

> Any actual transaction between the parties, however, gave rise to the ordinary legal rights ; for the fact that it was not of obligation to do the transaction did not divest the transaction when done of its ordinary legal significance. This, my Lords, will, I think, be plain if we begin at the latter end of each transaction. Goods were ordered, shipped and received. Was there no legal liability to pay for them ? One stage further back goods were ordered, shipped, and invoiced. Was there no legal liability to take delivery ? I apprehend that in each of these cases the American company would be bound.

This case rests on the wide general principle that where one has expressly or impliedly requested another to render him a service without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay *quantum meruit*, *i.e.*, so much as the party doing the service has deserved, or, as we normally say a reasonable sum. By the letter of the 5th of October, 1920, Exhibit 78, the contractor was asked to carry on the work and assurance was given that it was the policy of the railway company to see that the contractors get a certain amount of profit.

Mr. Bagram has contended that there has been no abandonment of the original scheduled rates, but that there has been merely a variation of the contract in one particular and he has relied on the decision of the House of Lords in the case of *Morris* v. *Baron and Company* (1) in support of this proposition. Whether there has been a mere variation of terms or a rescission depends upon the facts of each particular case and is

(1) [1918] A. C. 1, 26.

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often not easy to determine, but the following test has been suggested by Lord Dunedin :—

> In the first case (variation) there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist ; in the second (rescission) you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.

Looking to the correspondence one cannot but come to the conclusion that, on the one side, the contractor was pointing to the difficulties of the work, to the heavy loss he would suffer if the scheduled rates are adhered to and asking for a settlement of final rates and, on the other, the railway company was increasing the scheduled rates by 25 per cent. and giving the contractor the assurance that he would have rates which will be reasonable and will leave sufficient margin of profit to the contractor. From this correspondence, it is manifest that both parties abandoned the original contract as in the printed schedule, to which were attached general and special conditions (*see* Ex. P., pages 210-212, Vol. III) and, although the railway were increasing the rates, the contractor still asked for a further increase as he was not satisfied with the last increase and asking for the settlement of final rates. On one point, both the railway company and the contractor were agreed, *viz.*, the rates as in the printed schedule must go and some larger rate must form the basis of the contract.

Mr. Bagram has strenuously argued that the original contract remained, except that there was some variation in the schedule of rates, but the other conditions remained intact; and reference is made to paragraph 15 of the conditions (page 210, Vol. III) that any alteration in rates after the work has commenced must be noted in the schedule and initialled by the

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engineer in charge and the contractor. Any increased rate claimed and not entered in the schedule as above will not be admitted as agreed to.

Applying the test laid down by Lord Dunedin in *Morris's* case (1) in the passage already quoted, it appears that the original contract was gone and, as the contractor completed his work, he is entitled to reasonable rates. The argument, as I understand it, is that, under clause 15 of the general conditions, it was permissible to the railway company to vary the rates and the railway company altered it under the condition No. 15 and there was merely variation of a part of the contract and no rescission of the contract. But clause 15 was altogether disregarded in the correspondence for increase was given in some of the letters without corresponding alteration in the schedule.

In this connection, reference is made to a decision of the House of Lords in *Earl of Darnley* v. *Proprietors, etc., of London, Chatham, and Dover Railway* (2), and reference is made to the following passage occurring in the speech of the Lord Chancellor :—

> When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to shew, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding—that both parties were proceeding on a new agreement, the terms of which they both understood.

There can be no doubt in this case that both parties understood that the old rates as embodied in the printed schedule must be abandoned. Ex. 78, page 47, Vol. III, which is described by counsel for appellant as the sheet anchor of the respondents' case supports this view. The letter of the District Engineer, dated the 20th April, 1921 (page 47, Vol. III), supports the same view. He says :—

> Your paragraph 6. You can see and sign the schedule in the Assistant Engineer's office. Above these rates, you will be paid 25 per cent. extra

(1) [1918] A. C. 1. (2) (1867) L. R. 2 H. L. 43, 60.

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on all item involving labour, provided you in return make reasonable arrangement to look after your coolies and make them so contented that they do not bolt.

* * * * *

The learned counsel for the appellants has raised a very important question with reference to the interest on the amount claimed. He contends, in the first place, that no decree for interest should have been allowed, as there was no contract, express or implied, to pay interest and he argues further that, in any event, interest, at the rate of 12 per cent. per annum, is excessive and his further extreme contention is that interest *pendente lite* should never be allowed. The amount of interest claimed and due, if interest is payable, is considerable and the case becomes of importance to the parties in consequence of the amount. In support of the contention that no interest should have been allowed up to the date of the suit, reliance has been placed on the decision of the Patna High Court in the case of *Pattinson* v. *Bindhya Debi* (1). That decision, it is to be noticed, is contrary to the view which has been taken consistently in this Court in the cases of *Mohamaya Prosad Singh* v. *Ram Khelawan Singh Thâkur* (2) and the case of *Khetra Mohan Poddar* v. *Nishi Kumar Saha* (3). The Patna decision seems to be opposed to the decision of their Lordships of the Judicial Committee in the case of *Chajmal Das* v. *Brij Bhukan Lal* (4), which laid down that, even though the claim of the plaintiffs be or is limited to interest which is not recoverable either under a contract or under the provisions of the Interest Act (XXXII of 1839), it is open to the court to make a decree for damages for wrongful detention of their money. In the case before the Judicial Committee, where the bonds stipulated for payment of principal in two years from its date with interest at 15 per cent. and half-yearly rests, but

(1) (1932) I. L. R. 12 Pat. 216.
(2) (1911) 15 C. L. J. 684.
(3) (1917) 22 C. W. N. 488.
(4) (1895) I. L. R. 17 All. 511; L. R. 22 I. A. 199.

omitted to provide for interest after the expiration of the two years, it was held that interest for the *post diem* period was nevertheless recoverable as damages for the non-payment at due date, and that, *prima facie* the rate would be the same as that provided in the bond during the two years, in this case, simple interest was ordered at 15 per cent. Mr. Justice Wort of the Patna High Court seems to think that this decision of the Judicial Committee cannot be reconciled with a later decision of their Lordships in the case of *Kalyan Das* v. *Maqbul Ahmad* (1), but if the facts of that case are examined it will be seen that there is no conflict between *Chajmal Das's* case (2) and *Kalyan Das's* case (1). The facts are:—In 1878, the mortgagees under the mortgage of 1863 got Rs. 6,988 on account of a redemption, which is only now taking place; therefore, they received it over thirty years too soon, therefore, they should not only allow it in account, which they have done, but should allow over thirty years' interest on it too. Alternatively, since 1878 the principle mortgage moneys under the mortgage of 1863 must be deemed to have been paid off in the proportion of Rs. 6,988 to Rs. 15,944 and as the enjoyment of the usufruct by the mortgagees was conceded only in consideration of the continuance of the mortgage loan, the enjoyment should be reduced *pro tanto* from that date; in strictness, on redemption, a part of the rents and profits collected should be returned or credited in account to the mortgagors in the above proportion, but for simplicity's sake interest at a sufficient rate will do as well. One cannot, however, help remembering here that the persons, who are asked to repay these profits are the respondents, whose predecessors never collected them or had anything to do with them, and that the persons to whom they are to be repaid are the successors of Debi Das, who collected and enjoyed them and probably bequeathed them to the appellants, but this inconvenient reminiscence is for present purposes outside the hypothesis. In

(1) (1918) I. L. R. 40 All. 497, 504. (2) (1895) I. L. R. 17 All. 511; L. R. 22 I. A. 199.

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this state of facts their Lordships of the Judicial Committee said this :—

> To the first way of putting the matter their Lordships reply, as the High Court replied, that interest depends on contract, express or implied, or on some rule of law allowing it. Here there is no express contract for interest and none can be implied, and no circumstances less capable of justifying the allowance of interest as matter of law can be imagined. The mortgage of 1863 is the answer to the second view. It treats the usufruct as a whole, as a remuneration for the loan or any part of it so long as it remains outstanding.

The facts of this case are somewhat peculiar and all that was laid down was that a man cannot claim interest for money practically in his own pocket. After the abandonment of the original schedule rates, the law implied a promise to pay at market rate and if there is a breach the court is entitled to assess damages under section 73 of the Indian Contract Act. It appears that the work was completed in December, 1924, and, on the 23rd of September, 1925, the plaintiff contractor wrote a letter to the Assistant Engineer in charge that he would charge interest on Rs. 65,714 at 15 per cent. per annum, as the amount, though admittedly due, was being unlawfully withheld from him. The interest before suit was claimed from the 26th of July, 1925 to 29th November, 1927. In this case, the interest is really in the nature of damages for detention of the debt. In the case of *Cook* v. *Fowler* (1), Lord Cairn refers to the well-known principle that any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant and the sum which properly and under all the circumstances should be awarded for damages. No doubt, *prima facie* the rate of interest stipulated for up to the time certain might be taken and generally would be taken, as the measure of interest but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.

(1) (1874) L. R. 7 H. L. 27.

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And this is what was said by Lord Morris in *Chajmal's* case (1) above referred to. The appellant has also referred to a decision of this Court in the case of *Prosonnomoyi Ghoshani* v. *Gopal Lal Sinha* (2) where Mr. Justice Walmsley held that interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt. Mr. Justice Huda did not agree with him. He held that the plaintiff in that case was clearly not entitled to any interest under the Interest Act. But, observed the learned Judge:—

> That in my opinion does not debar him from claiming interest by way of damages under section 73 of the Contract Act.

Mr. Justice Walmsley's view no doubt supports the appellant, but we are not prepared to agree with him in view of the decision of the Judicial Committee and of this Court to which reference has already been made.

The ground, therefore, that no interest should be allowed before suit should fail. The next point taken is that interest *pendente lite* should not be allowed. There is no authority for this proposition. On the other hand there is authority for the proposition that, for the period between the filing of the plaint and the determination of the suit, the plaintiffs are entitled to interest [see *Kandappa Mudaliar* v. *Mutuswami Ayyar* (3)]. On the point of interest another ground is taken and it is said that 12 per cent. per annum is excessive. Considering all the circumstances of the case, regard being had to the fact that there is no evidence that the contractor sustained actual damage or that he paid 12 per cent. on his borrowings, we think that 9 per cent. per annum is the fair rate of interest that the plaintiffs can claim. We, accordingly, reduce the rate of interest from 12 per cent. to 9 per cent. and the decree of the Subordinate Judge must be varied in this respect.

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PATTERSON J. I agree.

*Appeal allowed in part.*

A. A.

(1) (1895) I. L. R. 17 All. 511; L. R. 22 I. A. 199.

(2) (1919) 31 C. L. J. 348.

(3) (1926) I. L. R. 50 Mad. 94, 108.