It is enough if the delict was the same to a substantial degree :—(1906) 29 Mad. 72.

Where the transferor is not guilty as the transferee, relief may be given :—(1895) 23 Cal. 460. See also the Trusts Act s. 84 ; The Specific Relief Act s. 35 (b).

As to the point of escheat left open in this case, see (1887) 11 Mad. 157 and see also (1882) 6 Mad. 121.]

[224] APPELLATE CIVIL.

The 4th July, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE KINDERSLEY.

Vengideswara Putter.....(Plaintiff) Appellant in No. 718 and Respondent in No. 856

versus

Chatu Achen.....(Second Defendant) Respondent in No. 718 and Appellant in No. 856.*

Stipulation to pay contract rate of interest upon breach of contract not an independent obligation—Plaintiff entitled to costs when the amount stipulated for on breach of contract is not tendered, and decision of Court is required to ascertain rate of compensation due—Contract Act, Section 74.

V lent Rs. 1,500 to *C* and the members of his family under a bond by which it was agreed that *C*'s family should demise certain land on kanom to *V* and receive a further sum. It was also stipulated in the bond that *C* and the members of his family should pay interest at 6 per cent. upon Rs. 1,500 until the execution of the kanom deed, and interest at 24 per cent. from the date of the loan in the event of their not making the demise. The demise was not made.

Held that the stipulation for the enhanced rate of interest did not create an independent obligation, and that the proper course was to determine what would be a sufficient compensation for the breach of contract.

C tendered what he considered sufficient compensation to *V* before suit and claimed exemption from payment of interest and costs.

Held that as *C* had not tendered the amount stipulated for in the bond, *V* was justified in coming to the Court to obtain a decision as to the rate of compensation which should be paid and was entitled to his costs.

IN this case the plaintiff sued to recover from the defendants personally and by sale of the property hypothecated Rs. 2,530, being principal (Rs. 1,500) and interest due on a bond, dated 25th July 1877.

The seven defendants were members of one of the houses of the *Palghat* Raja's family. In consideration of a loan of Rs. 1,500 they agreed to demise certain lands to the plaintiff on kanom for Rs. 3,428-9-2, the difference to be paid on the date of execution of the kanom deed, and until such time to pay

* Second Appeals, Nos. 718 and 856 of 1880, against the decree of H. Wigram, Officiating District Judge of South Malabar, modifying the decree of the Subordinate Judge of South Malabar, dated 20th September 1880.

interest at 6 per cent. on Rs. 1,500, and, in default on their part to pay such interest, to pay interest at an enhanced rate of 24 per cent. to be paid from the date of the bond. It was further stipulated in the [225] bond that the lands which were to be demised on kanom should be charged with the repayment of the principal and interest of the loan (Rs. 1,500).

The defendants, owing to family dissensions, failed to carry out their part of the contract.

Defendants 1 and 5 were *ex parte*.

Defendant 2 admitted the bond and pleaded tender of the amount due with reasonable interest in September 1878, and contended that the stipulation in the bond for payment of interest at 24 per cent. was in the nature of a penalty which could not be enforced.

Defendants 3, 4, 6, 7 admitted the bond, and pleaded that so far as they were concerned they were willing to demise the lands to plaintiff as agreed.

During the suit defendant 2 paid into Court Rs. 1,700.

The Subordinate Judge gave the plaintiff a decree for Rs. 830 and costs to be realised by sale of the property if not paid within thirty days from the date of the decree. Defendants 1—7 to pay plaintiff's costs. Defendant 2 to pay costs of defendants 3, 4, 6, 7 with interest at 6 per cent.

Defendant 2 appealed to the District Court.

The District Judge, considering that the decree should be a personal one only, as plaintiff might have sued for specific performance of the agreement to demise, but had preferred to sue for damages for breach of contract, and that plaintiff was only entitled to a reasonable compensation, *i.e.*, interest at 12 instead of 24 per cent., modified the decree accordingly and ordered the defendants to pay plaintiff's costs on Rs. 2,040 in the Lower Court and each party to bear their own costs of appeal.

Both plaintiff and defendant 2 appealed to the High Court, the plaintiff demanding 24 per cent. interest on his bond and a decree against the property hypothecated, and the second defendant contending that the suit ought to have been dismissed because he had made a valid tender which had been refused by plaintiff; and that plaintiff was not entitled to interest since the date of tender not to costs as awarded.

A. Ramachandrayyar for the (Plaintiff) Appellant in S. A. No. 718 of 1880.

[226] Mr. *Shephard* for the (Defendant 2) Appellant in S. A. No. 856 of 1880.

The arguments sufficiently appear in the **Judgments** of the Court (TURNER, C. J., AND KINDERSLEY, J.).

Turner, C.J.—The lands which were to be demised to the plaintiff were, at the time the agreement of the 25th July 1877 was made, held by another tenant from whom it was intended they should be recovered. Accordingly, the defendants brought Original Suit 734 of 1877 against the tenant and obtained a decree which was confirmed on appeal; but, owing to dissensions among them, they were unable to carry out their agreement with the plaintiff. Desiring to rescind the contract, the second defendant, before suit, offered the plaintiff the principal money with interest at 12 per cent., but the plaintiff refused to receive it and brought the present suit to recover the principal sum with interest at 24 per cent. from the date of the bond: the second defendant paid into Court Rs. 1,700.

The Subordinate Judge gave the plaintiff a decree for the balance of amount claimed, to be recovered from the defendants personally and by sale of the property which was to have been demised. On appeal the Judge pronounced the agreement for interest at 24 per cent. a penal clause which the Court was not necessarily bound to execute in its rigor, and, considering that a sum equal to interest at the rate of 12 per cent. from the date of the agreement would be reasonable compensation, he reduced the sum decreed by the Court of First Instance accordingly. The Judge also confined the relief granted to a personal decree, and released the property from the charge on the ground that the plaintiff, if he had been so minded, might have sued for specific performance, but that he had elected to sue for damages for breach of the contract. He ordered the defendants to pay the plaintiff's costs on Rs. 2,040, the principal sum, with interest at the rate of 12 per cent. from the date of the agreement to the date of the Subordinate Judge's decree, and he ordered each party to pay his own costs in the Appellate Court.

Both parties are dissatisfied with the decree. In Second Appeal 718 of 1880 the plaintiff contends the Judge erred in refusing to give effect to the express agreement of the parties that, in case the kanom demise was not made, interest should be paid at the **[227]** rate of 24 per cent., that the Judge should not have disallowed the charge on the property, and should not have refused him his costs of the appeal. In Second Appeal 856 of 1880 the defendant complains that, having made a valid tender of the principal and interest at the rate allowed, the suit should have been dismissed with costs, that the plaintiff should have been allowed no interest subsequently to the date of the tender, and that the plaintiff was not entitled to costs on the amount paid into Court, and he was entitled to costs in proportion to that amount.

The plaintiff relied on *Omda Khanum* v. *Brojendro Coomar Roy Chowdhry* (12 B.L.R., 451). In that case the plaintiff advanced money to the defendant to enable him to recover a share in certain property on the terms that he should be recouped his advances with interest by receiving a lease of the share, that one-fourth of the profits should be regarded as interest, one moiety of the remaining three-fourths applied in reduction of principal, and the other moiety be paid to the defendant, and that, if the defendant failed to make the lease, the plaintiff should be repaid his advances with interest at the rate of 75 per cent. per annum. It was held that the agreement for payment of interest was an estimate by the parties of the damages to which the plaintiff would be entitled, and that, in the absence of proof of fraud, misrepresentation, or undue advantage, the contract was not so unreasonable, inequitable, or oppressive that the Court would refuse to enforce it. The plaintiff also relied on *Arulu Maistry* v. *Wakuthu Chinnayan* (2 M. H. C. R., 205).

The defendants, on the other hand, contended that the agreement to pay interest at the rate of 24 per cent. was a penalty, and that, under Section 74 of the *Contract Act*, notwithstanding the agreement, the Court had power to determine at what rate, not exceeding the rate agreed, interest should be paid as compensation for the breach. In support of this contention the learned Counsel cited *Venkittarama Pattar* v. *Kambarath Keshava Menon* (I. L. R., 1 Mad., 348.)

In *Arulu Maistry* v. *Wakuthu Chinnayan* the Court construed the agreement as stipulating for the payment of interest at a certain rate up to a certain date and thereafter for interest at a higher rate, and held that the question whether the increased **[228]** rate of interest was in the nature of a penalty did not arise. In the *Bengal* case the bargain may have been attended with

considerable risk, being contingent on the result of a contemplated litigation. In both the cases relied on for the plaintiff the contracts were made before the *Contract Act* of 1872 came into force. Since the passing of that Act, although the parties may have agreed to enter in the contract an estimate of the damages to be paid in the event of breach, the Court is bound to regard that sum only as the agreed maximum, and to consider whether reasonable compensation will not be made by the award of a less sum. The intention and effect of the 74th section of the Act was to abolish the distinction which had theretofore been recognized by the Courts between the compensations for breach of contracts known respectively as liquidated damages and penalty. The Court has still to determine the question which arose in *Arulu Maistry* v. *Wakuthu Chinnayan* whether the terms of a stipulation in a contract create an independent obligation or ascertain the compensation for the breach of an obligation. In the case last mentioned the Court held the stipulation did not ascertain compensation for the breach of an obligation, but was in itself an independent obligation.

In the case now before the Court the stipulation for the payment of interest at the higher rate is, be it observed, to be carried back to the date when the advance was made. In the event of a breach of the original obligation, it substitutes for it another and more onerous obligation. The Judge was, therefore, in my judgment, justified in regarding it as a stipulation for compensation and in proceeding to exercise his discretion in determining what, under the circumstances, would be a sufficient compensation. The Judge being then at liberty to award, in lieu of interest at the rate agreed, interest at such a rate as would, in his judgment, reasonably compensate the plaintiff, and there being nothing plainly unreasonable in the award made by him, the Court is not at liberty in second appeal to disturb it. But the Judge was in error in refusing to enforce the payment of the principal and interest awarded as a charge on the property. The parties had distinctly agreed that they should be so charged. The decree of the Lower Appellate Court on this point must be reversed.

[229] With respect to costs, the plaintiff was, I am of opinion, entitled, if the defendants declined to pay interest at the rate entered in the contract, to obtain a decision of a Court as to the rate which should be paid. It is impossible, under such circumstances, to estimate closely the compensation due. With respect to the costs of the parties in the Court of First Instance, I see nothing inequitable in the order of the Judge, and, although I have found the Judge improperly refused to allow the enforcement of the charge on the property, I am not prepared to disturb his order as to the costs of the appeal in which in a measure the defendants succeeded. The Appeal No. 856 will be dismissed: the Appeal No. 718 will be in part decreed and in part dismissed, so much of the decree of the Lower Appellate Court being reversed as reversed the decree of the Court of First Instance, ordering the sale of the property, in default of payment of the amount decreed. As in other respects the appeal failed, I would order each party to bear his or their own costs.

Kindersley, J.—I am of the same opinion. The defendants agreed for a certain consideration, part of which they had already received, to demise 200 *paras** of land by a deed to be executed by them; failing which, they agreed upon the security of the property to refund the sum already received with interest at 2 per cent. per mensem. The principal question argued was whether the plaintiff was entitled to interest at the unusual rate agreed upon, or only to reasonable compensation. The case of

A local measure.

Arulu Maistry v. *Wakuthu Chinnayan* (2 M.H.C.R., 205) would be an authority for allowing interest at the rate agreed upon, but for the subsequent passing of the *Indian Contract Act*, 1872 ; Section 73 of that Act lays down the general principle that the party who suffers by a breach of contract is entitled to compensation for any loss or damage naturally arising out of such breach, or which the contracting parties knew to be likely to arise from it, but not for remote or indirect damage. And Section 74 provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of such breach is entitled, whether or not any damage or loss is proved to have been caused thereby, to receive from the **[230]** party who has broken the contract reasonable compensation not exceeding the amount so named. It is unnecessary to consider whether the high rate of interest was in the nature of a penalty, because the 74th section recognizes no distinction between an agreement to pay a penalty and one to pay liquidated or ascertained damages. In either case the party is entitled only to reasonable compensation not exceeding the amount so named.

On the other points also I agree with the Chief Justice.

NOTES.

[The Indian Contract Act sec. 74 was amended by Act VI of 1899, s. 4 and the Section runs thus:—

Sec 74.—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach *or if the contract contains any other stipulation by way of penalty*, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named *or as the case may be, the penalty stipulated for.*

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty etc. etc

See the notes to the leading case of *Mackintosh* v *Crow*, (1883) 9 Cal. 689. See also (1882 6 Mad. 167 ; (1888 12 Mad. 161 ; (1889) 14 Bom. 200.]

[3 Mad. 230]

APPELLATE CIVIL.

The 5th July, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE AND MR. JUSTICE MUTTUSAMI AYYAR.

Marana Ammanna.....(Plaintiff) Appellant

versus

Pendyala Perubotulu and another.....(Defendants) Respondents.*

Mortgage-deed—Clear expression of intention necessary to take away mortgagor's right to redeem—Equity of redemption in hands of different purchasers—Right to redeem on payment of proportionate amount of debt through conduct of mortgagee.

A mortgage-deed stipulated for the liquidation of a moiety of the debt by the usufruct of certain land for seven years, and as to the other moiety, stipulated for its repayment by

* Second Appeal No. 839 of 1880 against the decree of the Subordinate Judge of Cocanada, modifying the decree of the District Munsif of Cocanada, dated 27th July 1880.