APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

1888.
Feb. 14, 29.

BASAVAYYA (PLAINTIFF), APPELLANT,

and

SUBBARAZU (DEFENDANT), RESPONDENT.*

Contract Act, s. 74—Penalty—Payment of higher rate of interest from date of bond on breach.

Where a mortgage-deed provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment of any instalment on the due date, for interest at 12 per cent. from the date of the bond:

Held, following *Balkishen Das* v. *Run Bahadur Singh* (I.L.R., 10 Cal., 305) that the stipulation being reasonable, the plaintiff was entitled on default to recover the higher rate of interest from the date of the bond.

APPEAL from the decree of Venkata Rangayyar, Subordinate Judge at Ellore, confirming the decree of G. Hanumantha Rau, District Munsif of Tanuku, in suit 333 of 1885.

The facts and arguments appear from the judgment.

Subba Rau for appellant.

Respondent did not appear.

The Court (Collins, C.J., and Muttusami Ayyar, J.) delivered the following

JUDGMENT:—The respondent executed in favor of the appellant the mortgage-bond A on the 21st October 1882. The bond provided for repayment of the debt in four instalments with interest at 6 per cent. per annum and stipulated that interest was to be paid at 12 per cent. per annum from the date of the bond in default of payment of instalments on the due dates. Both the lower courts held that the stipulation was penal and decreed interest only at 6 per cent. per annum. It is contended for the plaintiff in second appeal that the stipulation is not penal and whether it ought to have been enforced is the only question that arises for decision in this case.

In *Aruhu Mastry* v. *Wakuthu Chinnayan*(1) decided in 1864 it was held by this Court that a stipulation to pay a higher rate of

* Second Appeal 272 of 1887.

(1) 2 M.H.C.R., 205.

interest on failing to repay the debt in six months was not penal. In that case the bond provided for payment of principal and interest at 1 per cent. per mensem in six months and in default that the rate of interest should be raised to 6¼ per cent. per mensem from the due date. The Court observed that the plaintiff had a right under his contract to the higher rate of interest and that there was no ground for treating the higher interest as a penalty. In *Mackintosh* v. *Crow*(1) the High Court at Calcutta expressed a similar opinion. In that case, however, a distinction was made between a bond in which the contract is merely that if the money is not paid at the due date it shall *thenceforth* carry interest at an enhanced rate and a bond of which the provision is that in default of payment on the due date a higher rate of interest shall be payable *from the date of the contract.* The Court observed that in the last-mentioned case the provision was penal and referred to s. 74 of the Contract Act and to *Rasaji Davlaji* v. *Sayana Sagdu*(2), *Mazhar Alikhan* v. *Sardarmal*(3), and *Muthura Persad Singh* v. *Luggun Kooer*(4). In *Muthura Persad Singh* v. *Luggun Kooer* it was observed that when the agreement was to pay an increased rate of interest from a future day it might well be regarded as a substantive part of the contract, not as a penalty for its breach; but where, as in that case an increased rate of interest was made payable from the date of the bond in case of default, it could not be regarded in any other light than as a sum named in the contract to be paid in case of breach within the meaning of s. 74 of the Contract Act. In *Jaganadham* v. *Ragunadha*(5) an agreement to pay higher interest from the date of default was held not to be penal and *Mackintosh* v. *Crow* was approved.

The result of the foregoing decisions, so far as they bear on the question before us, was that an agreement to pay an enhanced rate of interest on default from the date of default was not penal, because such agreement was a substantive part of the contract, but that an agreement to pay higher interest on default from the date of the bond was penal, because it was an agreement to pay a sum mentioned in the contract in case of breach. The question, however, ultimately came under the consideration of the Privy Council

(1) I.L.R., 9 Cal., 693.
(2) 6 Bom. H.C.R., A.C., 7.
(3) I.L.R., 2 All., 769.
(4) I.L.R., 9 Cal., 615.
(5) I.L.R., 9 Mad., 276.

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in *Balkishen Das* v. *Run Bahadur Singh*(1). In that case as in the one before us, the agreement was to pay on default higher interest at one rupee per cent. per mensem from the date of the solehnama. Adverting to the contention that such an agreement was penal, the Judicial Committee said, "it was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances." The true test is not whether the agreement is a contract to pay a given sum on its breach, but whether it is reasonable in the circumstances of the case or only substitution of a higher for a smaller rate of interest in a given state of circumstances. Following the decision of the Privy Council, we modify the decrees of the courts below by awarding to the plaintiff interest at 12 per cent. instead of 6 per cent. per annum from the date of the bond A to the date of realization, and his whole cost throughout, and confirm the decrees in other respects.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

1887. Nov. 4, Dec. 16.

VELAN (DEFENDANT No. 4), APPELLANT,

and

KUMARASAMI AND ANOTHER (DEFENDANT No. 2 AND PLAINTIFF), RESPONDENTS.*

Civil Procedure Code, 1859, *s.* 259—*Certificate of sale—Registration Act*, 1866, s. 49—*Proof of title without production of certificate*—Omnia presumuntur rite esse acta.

Assuming that s. 49 of the Registration Act, 1866, required that a certificate of the sale of land in execution of a decree passed under the Civil Procedure Code, 1859, should be registered, a plaintiff who has purchased land at such a sale is not bound to rely on the certificate to prove his title.

If it is proved *aliunde* that the sale took place and that possession was given, the Court should presume, after long lapse of time and possession by a mortgagee of the purchaser, that the sale was duly made by the Court.

APPEAL from the decree of C. Venkoba Rau, Subordinate Judge of Madura (West), reversing the decree of P. A. Lakshmana Chetti, District Munsif of Tirumangalam, in suit 525 of 1885.

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(1) I.L.R., 10 Cal., 305.

* Second Appeals 165 and 307 of 1887.