given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief, which the section enables to be granted.

We dismiss this appeal, and, as the Judge had not jurisdiction to try the case, we reverse the decree, so far as it gave any directions for the performance of the trust, or gave the plaintiffs any relief or decided any rights therein of either plaintiffs or defendant.

Appellant is to pay the costs of this suit throughout, including this appeal.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

NANJAPPA (PLAINTIFF), APPELLANT,

and

NANJAPPA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1888. Nov. 20. Dec. 10.

Contract Act, ss. 63, 74—Penalty—Stipulation for enhanced interest—Interest on decree amount up to date of payment—Remission of part performance of contract —Sum accepted on account of interest.

A hypothecation bond provided for payment of interest on the principal sum at the rate of 9 *per cent.*, and contained a further provision, that on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor :

Held, (1) that the plaintiff had not waived any right under the bond by accepting the payment on account of interest :

(2) that the provision for enhanced interest calculated from the date of the bond on default, was of the nature of a penalty under s. 74 of the Contract Act.

(3) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent.

Balkishen Das v. *Ram Bahadur Singh*(1) discussed and distinguished; *Baij Nath Singh* v. *Shah Ali Hosain*(2) dissented from.

SECOND appeal against the decree of J. D. Irvine, Acting District Judge of Coimbatore, in appeal suit No. 138 of 1887, modifying

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* Second Appeal No. 251 of 1888.

(1) I.L.R., 10 Cal., 305 ; s.c. L.R., 10 I.A., 162. (2) I.L.R., 14 Cal., 248.

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the decree of T. Ramasami Ayyar, District Munsif of Udumalpet, in original suit No. 28 of 1887.

This was a suit to recover the sum of Rs. 2,313-12-0 due on a registered hypothecation bond, dated 23rd February 1882.

The portions of the bond which are material for the purposes of this report ran as follows :—

"We have hypothecated to you the undermentioned properties consisting of well, lands, and house, &c., for Rs. 1,500, which sum we have received from you in cash . . . . We shall therefore pay, on the 13th Masy of each year, the interest on the said amount at $\frac{3}{4}$ per cent. per mensem, and pay the principal amount in the fifth year, *i.e.*, 13th Masy of Viyaya year, together with the interest of that year. In case of default to pay the interest on the dates on which they may be due, and in case of default to pay the principal amount on the date it is due, we shall pay on demand the interest accruing on the said amount for the period of default at $1\frac{1}{4}$ per cent. per mensem from the date of the document and the principal. If interests or the principal amount be paid towards this document, we shall endorse the payments on this."

The following endorsement appeared on the document, signed by the debtors :—

"Paid on 17th June 1884 Rs. 285 on account of the interest in respect of this bond. This sum of Rs. 285 was paid."

No payment other than that referred to in the above endorsement was made in respect of the bond.

The District Munsif passed a decree for the full amount claimed, which was calculated according to the terms of the document quoted above. The defendants, however, appealed on the ground that the stipulation for an enhanced rate of interest should be construed as a penal clause, since it related back to the date of the bond. The District Judge on appeal modified the decree of the District Munsif expressing his decision as follows:—

"The bond was executed in February 1882. In 1883, defendants made default and again in 1884 plaintiffs took no action on this, but in June 1884 accepted payment by defendants of Rs. 285 on 'account of interest.' The actual amount of interest then due at 9 per cent. was Rs. 270. At the enhanced rate it would have been Rs. 450. It appears to me that the acceptance by plaintiff of this sum of Rs. 285 was in effect a condonement by him of the previous default and evinced an intention on his part not to

press for the enhanced rate. Under these circumstances, I consider that, although the subsequent default gave plaintiff a right to enforce the terms of the bond, the enhanced rate for the first two years should not have been allowed. Taking this view, plaintiff is entitled to receive the principal Rs. 1,500 + interest for three years at the enhanced rate, Rs. 675, total Rs. 2,175. This sum, with proportionate costs, I award him ; but, inasmuch as he has received this large sum as interest, I disallow further interest."

The plaintiff appealed to the High Court. No memorandum of objections or cross-appeal was preferred by defendants.

Mr. *K. Brown* for appellants.

There was no waiver or relinquishment of his rights under the bond by reason of the plaintiff's acceptance of the sum of Rs. 285 in June 1884 by virtue of s. 63 of the Contract Act or any other provision of law. The District Judge should have decreed interest up to the date of payment to the plaintiff, and otherwise should have confirmed the decision of the District Munsif who was right in enforcing the terms of the agreement. *Balkishen Das* v. *Run Bahadur Singh*(1), explained and applied in *Baij Nath Singh* v. *Shah Ali Hosain*(2).

Sankaran Nayar for respondents.

The terms of the agreement come within the purview of s. 74 of the Contract Act. *Jayanadham* v. *Ragunadha*(3), *Mackintosh* v. *Crow*(4), and other authorities referred to in these cases. The Privy Council decision cited related to a decree and not a contract and is inapplicable. *Shirekuli Timapa Hegda* v. *Mahablya*(5).

Mr. *K. Brown in reply.*

The Privy Council case is an authority on the rule of public policy in s. 74 of the Contract Act. Moreover the case arose on a decree by consent; the distinction drawn by West, J., in the passage cited was disapproved in *Baij Nath Singh* v. *Shah Ali Hosain*(2), and is not sound. Here there is no sum fixed within the meaning of s. 74 of the Contract Act.

The Court (Parker and Shephard, JJ.) delivered the following

JUDGMENT:—The action is brought to recover from the defendants the principal and interest due under a bond executed by the defendants on the 23rd February 1882. According to the

(1) I.L.R., 10 Cal., 305; s.c. L.R. 10 I.A., 162.
(2) I.L.R., 14 Cal., 248.
(3) I.L.R., 9 Mad., 276.
(4) I.L.R., 9 Cal., 289.
(5) I.L.R., 10 Bom., 435.

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terms of the bond, the defendants became bound to pay on the 23rd February in each year interest on the principal sum at 9 per cent. and the principal sum, Rs. 1,500, on the 23rd February 1887, together with interest then due: in case of default in paying interest or principal on the due dates, the defendants were bound to pay on demand the interest accruing on the principal amount "for the period of default at $1\frac{1}{4}$ per cent. per mensem from the date of the document and the principal." Default was made in 1883 and again in 1884, and after June 1884 no payment was made by the defendants. The suit was brought in January 1887. The District Judge, giving the defendants credit for Rs. 285, paid in June 1884 as a complete satisfaction for the two years' interest then actually due and payable, gave the plaintiff a decree for the principal sum and interest upon it at the enhanced rate for three years. Without deciding the question raised on the appeal he disallowed the claim for such interest accruing due on the first default, on the ground that the plaintiff had excused it by accepting the sum of Rs. 285 in June 1884. Seeing that the sum paid was greater than what was due for interest at the original rate, it is difficult to understand how the defendants can have supposed that the plaintiff had remitted any part of his claim, and anyhow there is no sort of evidence of any release given by the plaintiff or of any other discharge of the obligation to pay the whole sum of Rs. 450. Although the defendants' vakil was unable to support the decree on the reason given by the District Judge, it was open to him to support, and he did support it on the ground that the Court ought to have treated the stipulation for interest at 15 per cent., payable from the date of the bond as penal, and therefore only to have allowed reasonable interest by way of compensation. It has been held by this Court in several cases—*Vengideswara Putter* v. *Chatu*(1), *Vythilinga* v. *Sundarappa*(2), *Jaganadham* v. *Ragunadha*(3)—that such a stipulation as is found in the present bond should be treated as penal and should not be enforced by the Court; and the same view has been taken in several cases by other High Courts, see cases collected in *Sungut Lal* v. *Baijnath Roy*(4), *Bansidhar* v. *Bu Ali Khan*(5), *Khurram Singh* v.

(1) I.L.R., 3 Mad., 224. (2) I.L.R., 6 Mad., 167.
(3) I.L.R., 9 Mad., 276. (4) I.L.R., 13 Cal., 164.
(5) I.L.R., 3 All., 261.

Bhawani Baksh(1). The question raised by the learned Counsel for the plaintiff was whether, since the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh*, this view of the law can still be considered to be correct, and reliance was placed on *Baij Nath Singh* v. *Shah Ali Hosain* as an authority for the position that the cases above referred to must be treated as overruled by the Privy Council decision. In the Privy Council case the question arose with regard to a decree made on the footing of a compromise according to which the plaintiff was to receive interest on the decretal sum at the rate of 6 per cent. and the defendants were to pay principal and interest by instalments of Rs. 30,000 a year. Provision was made for substituting interest at 12 per cent. on default in payment of the instalment in several contingencies, and the particular provision which is material related to the contingency of the first instalment not being duly paid. On such default being made the decree-holder was entitled to interest at 12 per cent. from the date of the decree ; and default was made, the instalment not being paid till after due date. It was also provided that, in case of default which was construed as meaning on default in payment of any instalment except the first, interest should be paid at the higher rate on the entire decretal money from the date of default. It was argued that this latter provision for enhanced interest payable upon the whole decretal money was of a penal character; but the Judicial Committee observed, "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." In their opinion the decree-holder was entitled to the whole decretal sum and interest at 6 per cent. from date of decree or so much thereof as might remain due after giving credit for all payments made on account, together with additional interest at the same rate on the first instalment from the date of the decree to the payment of such instalment, and also additional interest upon the principal sum for the period between the day on which the second or any subsequent instalment became due and the day on which it was paid. While it must be admitted that by this decision the enhanced interest was allowed on the first instalment from the date of decree, it does not appear from the report that any special

(1) I.L.R., 3 All., 440.

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argument was directed against the particular stipulation. According to the report it was the other stipulation, viz., that for payment of enhanced interest on the whole decretal money that was impugned in the argument, and this stipulation was not open to the objection that it made the higher rate of interest payable from the date of decree. It is further to be observed that the Judicial Committee were not dealing with a contract having regard to the provisions of the Contract Act, but with a decree, and as West, J., has pointed out "the principles which govern the enforcement of contracts and their modification when justice requires it do not apply to decrees which as they are framed embody and express such justice as the Court is capable of conceiving and administering," *Shirekuli Timapa Hegda* v. *Mahablya*(1). For these reasons we are of opinion that we are not bound by the decision of the Judicial Committee to treat the cases decided by this Court as overruled.

In our opinion there is a substantial distinction between a stipulation in a bond to pay enhanced interest from the date of default and a stipulation to pay such interest from the date of the bond. It is clearly established by the English cases that, whereas there is nothing in the nature of a penalty in an arrangement under which a debtor on failure to pay a smaller sum than that actually due within a given time is remitted to his obligation to pay the larger sum, a stipulation for the payment of a sum exceeding the actual debt, if that debt is not paid at the time when it is due, is regarded as a penalty against which equity will relieve. *Thompson* v. *Hudson*(2). *The Protector Endowment Loan Co.* v. *Grice*(3). By the cases in this country it is well established that an agreement to pay a sum of money on a given day with interest at a certain rate with a stipulation that in default the debtor shall thenceforward pay a higher rate of interest is strictly enforceable. In such an agreement no question of penalty arises because it imposes an obligation on the debtor to pay a larger sum than what was originally due. In the words of s. 74 of the Contract Act no sum is named as the amount to be paid in case of such breach. At the moment of the breach no larger sum can be exacted by the creditor, but from that date the terms on which the debtor holds the money became less favorable. By

(1) I.L.R., 10 Bom., 438. (2) L.R., 4 H.L., 1.
(3) L.R., 5 Q.B.D., 121.

the default he accepts the alternative arrangement of paying a higher rate of interest for the future. On the other hand where the stipulation is that on default the higher rate shall be payable from the date of the original obligation, the debtor does on default become immediately liable for a larger sum, viz., the difference between the enhanced and the original rate of interest already due, *Mackintosh* v. *Crow*(1).

This liability cannot be regarded as the price paid for the further enjoyment of the money allowed to him, because the amount is fixed and bears no relation to the time during which the money may continue unpaid. In the present case, the difference amounts to 6 per cent. on Rs. 1,500, viz., Rs. 90. On default, the debtor became obliged to pay that sum in addition to the principal and interest originally due under the bond. If a stipulation is penal which entitles a creditor, on his debtor's default in paying an instalment due, to demand double the amount of that instalment or 100 per cent., why is not the provision in the present case, by which 6 per cent. on the original debt is claimed, open to the same objection? It is said there is in the present case no sum *named* within the meaning of s. 74 of the Contract Act and that therefore that section is not applicable. To that argument we would reply that though no sum is named in rupees the extra sum payable is fixed and ascertainable beforehand, or at any rate at the time when default is made. To hold that more than this is required, and that it is necessary that the exact sum should be mentioned in the bond is in our judgment to countenance an easy mode of avoiding the effect of the section altogether. If regard is had to the date of default when the liability to payment of the extra sum accrues, it is clear that the objections taken by Mitter, J., in *Baij Nath Singh* v. *Shah Ali Hosain* to Wilson, J.'s, position in *Makintosh* v. *Crow* lose all their force. Mitter, J., argues that, because besides this liability another liability to pay higher interest in the future accrues, the whole stipulation cannot be brought within the terms of s. 74, but surely the addition of this obligation to pay in the future does not make the obligation to pay for the past any the less an obligation to pay a certain sum.

For these reasons and upon the authority of the cases decided by this Court, we hold that the provisions of s. 74 ought to have

(1) I.L.R., 9 Cal., 689.

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been applied to the present case, and that therefore the decree of the District Judge, though passed on wrong grounds, may be sustained. We modify the decree by allowing the plaintiff further interest at the rate of 6 per cent. from date of decree till date of payment, and otherwise dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

1888. Sept. 7. Oct. 23.

VENKATA (PLAINTIFF), APPELLANT IN S.A. 1140 OF 1886,

and

CHENGADU AND OTHERS (DEFENDANTS), RESPONDENTS.

MUNUSAMI (PLAINTIFF), APPELLANT IN S.A. 1141 OF 1886,

and

MUNIGADU AND OTHERS (DEFENDANTS), RESPONDENTS.

VENKATA (PLAINTIFF), APPELLANT IN S.A. 1142 OF 1886,

and

RAUTHU REDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, s. 6, sch. II, arts. 12, 95—Revenue Recovery Act (Madras)—Madras Act II of 1864, s. 59—Suit to set aside a sale for arrears of revenue—Fraud—Limitation.

Suit, in July 1885, to set aside a sale of land of the plaintiff, sold in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers; the plaintiff had knowledge of the alleged fraud more than six months before suit:

Held, that the law of limitation applicable to the case was s. 59 of Act II of 1864, and not s. 95 of the Limitation Act, and that the suit was therefore barred.

Venkatapathi v. *Subramanya* (I.L.R., 9 Mad., 457) explained, *Baij Nath Sahu* v. *Lala Sital Prasad* (2 B.L.R., Full Bench., 1), and *Lala Moharuk Lal* v. *The Secretary of State for India* (I.I.R., 11. Cal., 200) considered.

SECOND appeal, No. 1140 of 1886, against the decree of H. T. Knox, Acting District Judge of North Arcot, in appeal suit

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* Second Appeals Nos. 1140 to 1142 of 1886.