

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

GOPALUDU (PLAINTIFF), APPELLANT,

1894.
Sept. 6, 18.

v.

VENKATARATNAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Contract Act—Act IX of 1872, s. 74—Penal sum—Enhanced interest—Mortgage—Construction of covenant to pay.

In a suit to recover principal and interest due on a mortgage, dated 19th April 1882, it appeared that the instrument provided that the principal should be repaid with interest at 21 per cent. per annum in two instalments on 8th May 1883 and the 27th April 1884, respectively, and proceeded as follows:—"if the amount of each instalment be not paid on the date of such instalment, we shall make payment with interest at three rupees per cent. per mensem from the date of the bond." No payment had been made on account of principal or interest:

Held, that the plaintiff was entitled to recover the principal, together with interest calculated at 21 per cent. up to the dates when the instalments respectively became due, and at 12 per cent. from those dates to the date of the plaint and at 6 per cent. from that date until payment.

SECOND APPEAL against the decree of H. T. Ross, District Judge of Godavari, in appeal suit No. 83 of 1893, modifying the decree of P. Lakshminarasu Pantulu, District Munsif of Amalapur, in original suit No. 311 of 1892.

Suit to recover principal and interest due upon a mortgage bond, dated 19th April 1882, and executed by defendants Nos. 1 and 2 in favour of plaintiff. Defendants Nos. 3 to 5 were brought on to the record as being the undivided sons of defendant No. 1.

The mortgage in question was executed to secure the repayment of Rs. 200 with interest at the rate of 21 per cent. per annum in two instalments on certain days therein mentioned and it provided as follows:—

"If the amount of each instalment be not paid on the date of such instalment, we shall make payment with interest at three rupees per cent. per mensem from the date of the bond."

In his plaint the plaintiff claimed interest at the enhanced rate from the date of default only, and the District Munsif passed a

* Second Appeal No. 786 of 1894.

GOPALUDU
 ?
 VENKATA-
 RATNAM.

decree for the amount claimed up to the date of the plaint. On appeal, the District Judge modified the decree by allowing to the plaintiff in respect of interest the sum of Rs. 84-14-11 only up to the date of the plaint, together with interest at 6 per cent. on the whole debt from that date to the date of payment. He held that on the right construction of the mortgage it contained no provision for the payment of interest from the due date to the date of discharge, and the sum awarded in the decree on account of interest was calculated on this basis.

The plaintiff preferred this second appeal.

Sundera Ayyar and *Subramanya Ayyar* for appellant.

Srirangachariar for respondent.

MUTTUSAMI AYYAR, J.—This was a suit on a hypothecation bond dated the 19th April 1882. As regards the principal amount Rs. 200, both the Courts below decreed the claim. As regards interest, the bond provided that the principal shall be paid back in two instalments with interest at 21 per cent. per annum—Rs. 100 with interest on the 8th May 1883 and the remainder with interest on the 27th April 1884. The bond then proceeds to stipulate that if each instalment is not paid on the due date, then interest shall be paid at 36 per cent. per annum from the date of the bond. The plaint stated that there was default in paying both instalments and claimed Rs. 699-1-0 as interest due at the enhanced rate from the date of default. Relying on *Nanjappa v. Nanjappa*(1), the District Munsif decreed the interest claimed. But on appeal, the Judge was of opinion that there was no provision in the bond for interest from the due date to date of payment, and that the agreement to pay the enhanced rate extended only to the due date. Upon this construction of the document the Judge decreed interest at the enhanced rate as provided in the bond up to due date, refused interest from the due date to that of the plaint, and awarded interest at 6 per cent. per annum from date of plaint to date of realization. To this decision the plaintiff (appellant) objects on three grounds, viz. (i) that the Judge has misconstrued the document, (ii) that he ought not to have refused interest from date of default to date of payment, and (iii) that the interest is payable till date of payment as provided in the

(1) I.L.R., 12 Mad., 161.

bond. I am of opinion that the Judge is in error in holding that the bond contains no provision for payment of interest after the due date. The words from the date of the bond are used in contradistinction to the words from the date of default which is premised, and they are not designed to limit the time up to which interest is payable. The natural construction is that in case there is no default, interest shall be paid at 21 per cent. per annum, and that in case there is default, interest shall be paid at 36 per cent. per annum, and that the payment at such higher rate shall be not only prospective from the date of default, but shall also be retrospective from the date of the bond. This being so, the next question is whether the agreement to pay interest at 36 per cent. in case of default is in the nature of a penalty, and as such governed by section 74 of the Contract Act. That section pre-supposes a case in which a contract is broken and a sum is named as the amount to be paid on such breach, the party complaining of the breach is entitled to receive reasonable compensation not exceeding the amount so named. The general rule is that effect is to be given to the intention of the parties as expressed by the contract in the absence of any rule of law to the contrary. When the contract is to pay a higher rate of interest from the date of breach, its operation is prospective, and the proper construction is that the debtor who commits default intends to pay the alternative rate and to return the money lent. On this point all the High Courts are agreed. When the agreement is to pay the higher rate on default from the date of the contract, the question arises whether it falls under section 74, and as to this there is a conflict of opinion. The Full Benches of the High Courts at Calcutta and Bombay have held that section 74 is applicable and that the agreement is penal and ought to be relieved against. - *Kalachand Kyal v. Shib Chunder Roy*(1) and *Umarkhan Mahamadkhan Deshmukh v. Salekhan*(2). But the Full Bench of the High Court at Allahabad has held that section 74 does not apply to agreements to pay alternative rates of interest. In *Nanjappa v. Nanjappa*(3) a Divisional Bench of the High Court at Madras held that such agreement falls under section 74, and that though no sum is named in rupees, the extra sum payable is fixed and ascertainable before hand, or at any rate at the time when the default is made. In

GOPALUDU
v.
VENKATA-
RATNAM.

(1) I.L.R., 19 Calc., 392.

(2) I.L.R., 17 Bom., 106.

(3) I.L.R., 12 Mad., 161.

GOPALUDU
 V.
 VENKATA-
 RATNAM.

Basavayya v. Subbarazu(1), where a mortgage bond provided for repayment of the debt in four instalments with interest at 6 per cent., and, in default of payment on the due date, provided for interest at 12 per cent. from the date of the bond, another Divisional Bench held that the stipulation being reasonable, the higher rate of interest was payable from date of the bond. This may be reconciled with *Nanjappa v. Nanjappa*(2) by the fact that the alternative rate provided by the contract was one which might be adopted under the measure of reasonable compensation. In *Narayanasami Naidu v. Narayana Rau*(3), in which I took part, I followed *Basavayya v. Subbarazu*(1). In the present case the contract was to pay interest at 36 per cent. from the date of the bond, and it is therefore governed by section 74, according to *Nanjappa v. Nanjappa*(2) and the High Courts at Calcutta and Bombay. I would therefore award interest at 21 per cent. per annum from date of bond to due dates, 12 per cent. from these dates to date of plaint, and 6 per cent. from date of plaint to date of realization. Costs will be assessed proportionately.

SHEPARD, J.—The question is to what sum the plaintiff is entitled on account of interest payable in respect of the sum of Rs. 200 due under the bond executed by the defendant. The District Judge has held that there is no stipulation in the bond for payment of interest after the dates when the two instalments became due. The words used are “If the amount of each instalment be not paid on the date of such instalment, we shall make payment with interest at three rupees per mensem per hundred rupees from the date of the bond.” There is a *terminus a quo* given, but no express *terminus ad quem*, and the Judge has accordingly held that the interest was to run only up to the dates fixed for the payment of the instalments.

In this construction it appears to me that the Judge is wrong. The provision for enhanced interest pre-supposes a case of default. The date at which the instalment with interest at 21 per cent. fell due having passed, it is reasonable to suppose that it was intended that the substituted interest should run until the date of payment, and there are certainly no words indicating the contrary intention. The question then is whether the provision for enhanced interest is

(1) I.L.R., 11 Mad., 294. (2) I.L.R., 12 Mad., 161. (3) I.L.R., 17 Mad., 62, 65.

of such a character as to make section 74 of the Contract Act applicable.

According to the view expressed in *Nanjappa v. Nanjappa*(1) and adopted elsewhere, a stipulation for retrospective enhancement of interest is generally a penalty which has to be dealt with by the Court under the provisions of section 74. The Court has to give a reasonable compensation not exceeding the amount named. In addition to the interest at 21 per cent. on the two instalments up to the dates when they respectively fell due, I would allow interest from those dates at the rate of twelve per cent. up to the date of the institution of the suit and subsequent interest at six per cent.

GOPALUDU
v.
VENKATA-
BATNAM.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUBBA AYYAR AND OTHERS (DEFENDANTS NOS. 1 TO 3),
APPELLANTS,

v.

GANASA AYYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1894.
Nov. 19, 26.
1895.
January 9.

Hindu law—Partition of family property—Suit by plaintiffs against their father and uncles.

In a suit for partition of family property, the plaintiffs were the sons of one and nephews of others of the defendants who defended the suit:

Held, that the suit was maintainable.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 253 of 1893, modifying the decree of T. Venkatarama Ayyar, District Munsif of Valangiman, in original suit No. 183 of 1892.

Suit for partition of the family property. The plaintiffs, of whom the second being an infant sued by the first as his next friend, were the sons of defendant No. 2 and the defendants Nos. 1 and 3 were his brothers. Defendants Nos. 4 and 5 were the sons of defendant No. 1; the other defendants were strangers to the family who were in possession of part of the property of which the plaintiffs claimed their share. It was objected by the contending

(1) I.L.R., 12 Mad., 161.

* Second Appeal No. 1297 of 1894.