the English translation of the vernacular version of the clause in the Civil Procedure Code of 1859 which required that "only the right, title and interest of the judgment-debtor should be sold." In the translations the word 'only' has been transferred so as to qualify the word defendant, instead of qualifying the phrase "right, title and interest." "No doubt at the time of the sale (1877) the Code of 1877 had just come into force, and in it the clause requiring the Court to sell "only the right, title and interest "of the judgment-debtor" was omitted, but the old practice of inserting these words as a common form continued in many Courts for sometime after 1877 and it has been frequently held that this phrase does not necessarily imply that the interest sold is less than full proprietary interest. In the present case we agree with the Court below in thinking that it was the full proprietary interest which was intended to be sold and which was sold.

The fact that, though the late Poligar died in 1885, the plaintiff did not then claim the property, and in fact, only brought this suit in 1897, indicates clearly that he did not regard the sale as one that affected only a life interest of his father.

We accordingly hold that the suit was rightly dismissed and we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

ABBAKKE HEGGADTHI (PLAINTIFF), APPELLANT,

v.

KINHIAMMASHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

1906. March 9, 19, 30.

Mortgage—Simple mortgage, personal liability under exists unless special contract to the contrary—absence of specific prayer in plaint no ground for refusing appropriate relief—Delay no abandonment of right-Contract Act IX of 1872, s. 74, expl., effect of.

In the case of simple mortgages, the personal liability of the mortgagor exists, unless there is a specific contract to the contrary.

Wahid-un-Nissa v. Gobardhan Das, (I.L.R., 22 All., 453 at p. 461), referred to.

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*Appeal No. 140 of 1903, presented against the decree of R. A. Graham, Esq., District Judge of South Canara, in Original Suit No. 23 of 1902.

ABBAKKE HEGGADTHI v. KINHIAMMA SHETTY.

Where the plaint asks for a decree against the defendants as members of the family and 'for such other relief as the Court may think fit,' the Court ought to grant the plaintiff such appropriate relief as he is entitled to and such relief cannot be refused on the ground that there is no specific prayer for such relief. Though it is within the scope of the authority of the managing member of a Hindu family to execute a mortgage so as to bind the family assets, the plaintiff in a suit on such mortgage is not entitled to a personal decree against a defendant member of the family who is not a party to the mortgage in respect of the money alleged to be in his hands.

Mere delay by the plaintiff in suing to enforce a contract is no evidence of an intention not to enforce its terms. Under the explanation to section 74 of the Indian Contract Act, it is for the Court to decide on the facts of the particular case whether a stipulation for increased interest from the date of default is or is not a stipulation by way of penalty. It was not the intention of the Legislature to enact that such stipulations are always to be considered penal. The explanation was simply intended to meet the decisions in which it was held that such stipulations are not penal and must be enforced.

THIS was a suit to recover the principal and interest due on a hypothecation bond executed by the first defendant and his two deceased brothers in favour of the plaintiff on the 31st August 1891. The defendants Nos. 2 to 18 were the other members of the family. The plaintiff prayed

(i) for a decree directing the defendants as members of the family to pay to the plaintiff within a time to be fixed by the Court the sum of Rs. 9,110 and odd due on the mortgage,

(ii) for an order directing a sale of the property in default, and

(iii) for such further and other relief as the Court may deem fit to grant.

The material portions of the mortgage deed sued upon were as follows:

"On account of our urgency we have this day mortgaged to you for Rs. 4,000 the said property subject to an assessment of Rs. 147-11-3 situated within the boundaries mentioned in the said sale-deed No. 844 and consisting of paddy fields, garden land with trees, all sorts of buildings, tanks, wells and forests.

"We shall pay you Rs. 280 by the end of August every year, being the interest on the said amount at 7 per cent. per annum. On failure to pay the interest on the due date every year, we shall (sic) interest on the said arrears of interest at 12 per cent. from the date of default to the date of payment on the liability of the mortgaged properties. We shall pay you the principal amount of

Rs. 4,000 and the interest permitted to be in arrears with your consent on the 31st August of any year after five years from this date, *i.e.*, after the end of August 1894 and within the end of August 1896, together with the interest for that year in one lump sum on the liability of the said properties.

"On failure to pay the principal amount on the said date we shall pay you the same with interest at 12 per cent. from the date of default till the date of payment on the responsibility of the mortgaged property. For the principal amount, the interest due till payment and all such amounts, these two properties which are free from any prior alienation such as mortgage, sale, mulageni, &c., and from any other liabilities, are responsible. Such is the mortgage deed executed of our own accord."

The plaintiff's claim was made up of the principal amount, the interest due each year with simple interest thereon at 12 per cent.

The third and fourth issues were in the form following :—

Is the plaintiff entitled to enhanced rate of interest ?

Is the personal remedy barred ?

The material portions of the judgment of the lower Court dealing with these issues were as follows :—

"There is no specific prayer in the plaint for a personal remedy against any of the defendants, and though it is now claimed on behalf of plaintiff against first and second defendants, I do not think that it can be covered by the vague prayer at the end of the plaint 'for such other relief as the Court deems fit to grant.'

"Plaintiff has, I think, by her conduct, disentitled herself to any claim for interest at the enhanced rate provided in the bond. It is very stringent in its terms, but though she says she made several demands for payment, there is nothing to show that she made any demand until a month or two before she instituted the suit. That is to say, she kept quiet all the time that Manjanna Shetty, the person chiefly responsible, was alive, and only sued when the principal was nearly six years overdue. She has deprived defendant's family of the assistance of Manjanna Shetty in the suit, and it is possible that, if he had been alive he would have been able to adduce some evidence of the payment of interest. It looks as if there had never been any intention to enforce the penal rate in the first place and I decide the third issue in the negative.

ABBAKKE HEGGADTHI v. KINHIAMMA SHETTY.

"As a result, the decree will be that defendants as a family, by second defendant their ejaman do pay to plaintiff within six months from this date the principal Rs. 4,000 with interest at 7 per cent. from the date of the document to this date.

"That if they fail to pay within the said date, the properties hypothecated shall be sold and the sale-proceeds applied to the payment to plaintiff of the amount due to her."

Plaintiff preferred this appeal.

The Hon. *Mr. P. S Sivaswami Ayyar* for appellant.

K. Narayana Rau for second respondent.

K. P. Madhava Rau for third to eighteenth respondents.

JUDGMENT.—The plaintiff sues on a mortgage of 31st August 1891 executed by one Manjanna Shetty, now deceased, the then ejaman of the defendant's family and his two brothers. The first defendant is one of the brothers. The other defendants are members of the family and the second defendant is also the present ejaman of the family. The mortgage comprises certain items of property and the mortgagor's mortgage interest in some other items.

As regards the latter the plaintiff's allegation, which apparently is not denied, is that the mortgage money has been collected by the second defendant and is now in his hands. The deed provides for payment of interest at the rate of 7 per cent. per annum, with a further provision that, on default, interest at 12 per cent. shall be payable on the arrears of interest. The deed also provides for the payment of the principal on 31st August in any year after five years from the date of the deed with a further provision that, on default, interest at 12 per cent. shall be payable. It appears to have been assumed by all parties, though this is not clear from the translation of the deed, that the deed should be construed as providing for payment of interest at 12 per cent. on the principal if the principal was not paid on 31st August 1896.

The District Judge disallowed the plaintiff's claim for interest at 12 per cent. as regards both principal and interest and gave the plaintiff a decree for the amount advanced with interest at 7 per cent.

He gave a decree against the defendants as members of the family, but declined to give a personal decree against the first or second defendant.

We think the plaintiff is entitled to a personal decree against the first defendant as one of the parties who executed the mortgage deed.

It seems to us that, on the true construction of the deed, the deed contains a personal covenant to repay notwithstanding the introduction of the words "on the responsibility of the mortgaged property" in the provisions for payment of enhanced interest on default. At any rate the deed cannot be construed as excluding the personal liability of the mortgagor which exists, in the case of a simple mortgage, unless there is a specific contract to the contrary [see *Wahid-un-Nissa* v. *Gobardhan Das*(1)].

The plaintiff is not precluded from claiming under this covenant by reason of the fact that there is no specific prayer in the plaint with reference thereto. The plaint asks for a decree against the defendants as members of the family and such other relief as the Court may think fit. This is enough to enable us to give the plaintiff the appropriate relief if he is otherwise entitled to it [see the judgment of the Privy Council in *Cockerell* v. *Dickens*(2), and *Gopi Narain Khauna* v. *Bansidhar*(3)].

The suit is on a mortgage to which the second defendant is not a party and the plaintiff is not entitled in this suit to a personal decree against him in respect of the money alleged to be in his (the second defendant's) hands.

We are unable to adopt the view taken by the learned Judge that the plaintiff has disentitled herself by her conduct to interest at the enhanced rate provided for in the bond. The fact that she delayed in instituting her suit is, in our opinion, no ground for holding that there had never been any intention to enforce the enhanced rate. As regards the contention that the agreement to pay enhanced interest on default was a stipulation by way of penalty and could not be enforced under section 74 of the Contract Act as amended by Act VI of 1899, it is for the Court to decide whether the contract contains a stipulation by way of penalty. If the Court is of opinion that it does, the Court may award reasonable compensation not exceeding the penalty stipulated for. The explanation to the section provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty.

(1) I.L.R., 22 All., 453 at p. 461. (2) 2 M.I.A., 353 at p. 389.
(3) I.L.R., 27 All., 325 at p. 331.

ABBAKKE HEGGADTHI v. KINHIAMMA SHETTY.

This explanation, as pointed out in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(1), appears to have been introduced to meet the decisions to the effect that when the higher rate of interest is payable as from the date of default and not as from the date of the contract the contract rate is enforceable. The explanation read by the light of the illustrations shows that it is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty. We are of opinion that the stipulation in the present case is not a stipulation by way of penalty within the meaning of the section and that it is enforceable. There is nothing unconscionable or unreasonable about the agreement and the enhanced rate of interest which becomes payable on default is quite moderate.

It was urged on behalf of the respondents that the stipulations were by way of penalty since they provided both for an increased rate of interest and for compound interest, and *Dip Narain Rai* v. *Dipan Rai*(2), a decision which this Court in *Appa Rau* v. *Suryanarayana*(3) declined to follow, was relied upon. It is not necessary to discuss the authorities on this point since in the present case, although the plaintiff claims interest at 12 per cent. on interest in arrear she does not claim compound interest on such interest. Even in the view that the stipulations are by way of penalty and that the section applies, it is open to us under the section to award to the plaintiff the penalty stipulated for so long as it is not in excess of the reasonable compensation to which she is entitled, and we are not prepared to say that, in this case, the penalty is in excess of the reasonable compensation to which she is entitled.

The only other point with which it is necessary to deal is the contention put forward on behalf of the respondents that the members of the family are not bound by the contract. We are of opinion that it was within the scope of the authority of the ejaman of the family to make the contract and that the family are bound by it. There will be a personal decree against the first defendant for principal and interest up to date at the contract rate, subsequent interest at 6 (six) per cent. and there will be a decree against all the defendants *quoad* the family assets. The plaintiff is entitled to her costs throughout.

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(1) I.L.R., 25 Mad., 343. (2) I.L.R., 8 All., 185.
(3) I.L.R., 10 Mad., 203.