equitable reliefs especially as in this case we are dealing with material that has been excluded from the purview of the Act by express words: vide section 117. The provisions as to forfeiture in the Transfer of Property Act do not coincide with those enacted in the Conveyancing Act which does apply to agricultural leases. There is, however, no statutory bar to our seeking guidance from English Law and I entirely agree with the learned Chief Justice that Courts of Equity would not grant relief in the present case. For these reasons I agree that the appeal should be allowed.

KRISHNA SHETTI v. GILBERT PINTO.

NAPIER, J.

KUMARASWAMI SASTRI, J.—I agree with the judgment of my Lord and have nothing to add.

KUMARASWAMI SASTRI, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

MUHAMMADEN ABDUL SAFFUR ROWTHER AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

HAMIDA BIVI AMMAL AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3 AND 4), RESPONDENTS.*

1919, January, 9 and 16.

Interest Act (XXXII of 1839)—Award of interest, as damages, apart from the Act.

The Interest Act (XXXII of 1839) is not exhaustive of all cases where interest is allowable. The Act while specifically allowing interest in all cases of "debts or sums certain payable at a certain time or otherwise" saves by its proviso other cases in which it is legally allowable.

Where the suit was for a sum of money which would be payable to the plaintiff (a Muhammadan lady) as for her share on taking accounts of the business which was carried on by her father while he was alive and which was continued by her brothers, the defendants, after his death, wherein the amount due to the plaintiff was utilized by her brothers,

Held, (1) that the proviso in the Interest Act applied to the case and (2) that 6 per cent interest was payable as damages on the amount due to the plaintiff.

Miller v. *Barlow*, (1871) I.R., 3 P.C.C., 733, and *Hurro Persaud Roy* v. *Sham Persaud Roy*, (1878) I.L.R., 3 Calc., 654 (P.C.), followed; *Kamalammal* v. *Peerumeera Levvai Rowthen*, (1897) I.L.R., 20 Mad., 481, *Subramania Aiyar* v. *Subramania Aiyar*, (1908) I.L.R., 31 Mad., 250, and *Kalyan Das* v. *Maqbul Ahmad*, (1918) I.L.R., 40 All., 497, distinguished.

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* Appeal No. 390 of 1917.

ABDUL SAFFUR ROWTHER v. HAMIDA BIVI AMMAL.

APPEAL against the preliminary decree of K. S KODANDARAMA AYYAR, Subordinate Judge of Tuticorin, in Original Suit No. 70 of 1916.

This was a suit for partition and accounts brought by a Muhammadan lady against her brothers and sisters, who were co-heirs to her deceased father who was carrying on a cloth trade and who died in 1911, leaving behind him valuable movable and immovable properties, the subject-matter of the suit. The plaintiff alleged that the share due to her was, in spite of her demand, not given to her, but was utilized by her brothers, defendants Nos. 1 and 2, in the trade which they continued to carry on after the father's death. The defendants Nos. 3 and 4 were the sisters of the plaintiff. The defendants, while admitting that the plaintiff's share was utilized in the trade, pleaded, *inter alia*, that the deceased never received any interest from his debtors, that the defendants Nos. 1 and 2 neither received nor paid any interest in their dealings with others and that the plaintiff was therefore not entitled to interest. The Subordinate Judge found that, though the deceased father did not receive any interest, the defendants were receiving and paying interest in their dealings and gave the plaintiff a decree for partition allowing 9 per cent interest on the amount that might be found due to her on taking accounts. Defendants Nos. 1 and 2 preferred this appeal.

The Hon. *T. Ranga Achariyar* (with *C. R. Subrahmanya Ayyar*) for the appellants.—Interest on the plaintiff's share of her father's assets cannot be given. The share is not a 'debt or sum certain' within the Interest Act; see *Kamalammal* v. *Peerumeera Levvai Rowthen*(1), *Subramania Aiyar* v. *Subramania Aiyar and others*(2), *Kalyan Das* v. *Maqbul Ahmad*(3), *Marian Beeviammai* v. *Kadiri Meera Sahib Taragan*(4), *London Chatham and Dover Railway Company* v. *South Eastern Railway Company*(5), *Gowri* v. *Naraina Muchinthaya*(6), *Ganesh Baksh* v. *Harihar Baksh*(7).

The Hon. *Advocate-General* (*S. Srinivasa Ayyangar* with *K. Raja Ayyar*) for the plaintiff, first respondent.—The section of the Interest Act does not apply, but its proviso applies

(1) (1897) I.L.R., 20 Mad., 481.
(2) (1908) I.L.R., 31 Mad., 250.
(3) (1918) 40 All., 497, at p. 504 (P.C.).
(4) (1915) 29 I.C., 275
(5) (1823) A.C., 429, at p. 436.
(6) (1917) 45 I.C., 664.
(7) (1904) I.L.R., 26 All., 299 (P.C.).

and interest can be awarded as damages in cases of unascertained sums by a Court of Equity and Indian Courts are Courts of Law and *Equity*; see also section 73 of the Contract Act. Even in *London Chatham and Dover Railway Company* v. *South Eastern Railway Company*(1), regret is expressed that interest is not allowed in England owing to a settled practice. There is no such settled practice in India—see Madras Civil Courts Act, section 16, *Miller* v. *Barlow*(2), *Hurro Persaud Roy* v. *Sham Persaud Roy*(3), *Lakshmi Narasimha* v. *Lakshmamma*(4), *Alagappa Chettiar* v. *Muthukumara Chettiar*(5), *Khetra Mohan Poddar* v. *Nishi Kumara Saha*(6), *Mohamaya* v. *Ram Khelawan*(7), *Ahmed Misaji Saleji* v. *Hashim Ebrahim Saleji*(8), *Chajmal Das* v. *Brij Bhukan Lal*(9), *Hamira Bibi* v. *Zubaida Bibi*(10), *The Collector of Ahmedabad* v. *Lavji Mulji*(11), *Fakir Mahammad* v. *Ranqiah Goundan*(12), *Rodger* v. *The Comptor D'Es Compte De Paris*(13). Interest is payable also for another reason. My client was a minor at her father's death. The defendants Nos. 1 and 2 stand in fiduciary relation to the plaintiff whose money they have utilized. Section 88 of the Trusts Act applies—see its illustrations and sections 23 and 95; *Dolker* v. *Somers*(14); Lindley on Partnership, pages 631 and 632; Halsbury's Laws of England, volume 21, pages 37 to 40.

The Hon. *T. Ranga Achariyar* in reply.—Section 88 of the Trusts Act applies only if any advantage is gained. Section 23 of that Act will apply only if a trust is alleged and proved. One co-sharer is not bound to account to another; *Sivanarasa Reddi* v. *Duraiswami Reddi*(15). This case will not come under the proviso to the Interest Act; see *Caledonian Railway Company* v. *Carmichael*(16). The cases quoted by the other side were cases of fraud and wrongful detention which is not the case

(1) (1893) A.C., 429, at p. 436.
(2) (1871) L.R., 3 P.C.C., 733, at p. 750.
(3) (1878) I.L.R., 3 Calc., 654, at p. 660 (P.C.).
(4) (1913) 25 M.L.J., 531, at p. 534. (5) (1918) I.L.R., 41 Mad., 316.
(6) (1915) 22 C.W.N., 488, at p. 490. (7) (1911) 15 C.L.J., 685.
(8) (1915) I.L.R., 42 Calc., 914 (P.C.). (9) (1895) I.L.R., 17 All., 511 (P.C.).
(10) (1916) I.L.R., 38 All., 581, at p. 588 (P.C.).
(11) (1911) I.L.R., 35 Bom., 255. (12) (1913) 1 L.W., 181.
(13) (1871) L.R., 3 P.C., 465, at p. 476.
(14) (1834) 3 L.J. Ch. (N.S.), 200; s.c., 39 E.R., 1095.
(15) (1918) I.L.R., 41 Mad., 861, at p. 869.
(16) (1870) 2 Scotch Appeals, H.L., 56, at p. 66.

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here. Interest at 9 per cent is too much; 6 per cent is the usual rate.

E. S. Chidambaram Pillai and *P. N. Marthandam Pillai* for second and third respondents.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit by a Muhammadan co-sharer for recovery of her share of her father's property from her brothers and sisters. The right of the plaintiff who was a minor to sue was denied in the Court below but has not been pressed before us. The only two points which Mr. T. Ranga Achariyar argued were: (1) whether the plaintiff is entitled to mesne profits upon the immoveable property and (2) whether she is entitled to interest upon her share of the assets of the partnership carried on by her father. On the first question it was pointed out to us that in the Court below there was no allegation that mesne profits were not payable. There is no issue upon the point, and there is no discussion in the judgment of the Court below about it. Issue 6 assumes that the plaintiff was entitled to mesne profits, and only raises the question of the deductions claimed by the defendants in their written statement. Under these circumstances we refused to allow the learned vakil to argue that point before us.

The second question has been argued elaborately by Mr. Ranga Achariyar for the appellant and by the learned Advocate-General for the respondent. We have come to the conclusion that the decree of the Court below is right though not for the reasons given by it. It is clear from the admissions in the written statement and from the evidence in the case that the share of the plaintiff in the firm's assets was utilized by the first and second defendants in the trade carried on by them and that profits were derived from that trade. The amount of profits alone had not been ascertained. The learned vakil for the appellant relied upon *Kamalammal* v. *Peerumeera Levvai Rowthen*(1), *Subramania Aiyar* v. *Subramania Aiyar and others*(2), *Kalyan Das* v. *Maqbul Ahmad*(3) and the earlier Madras cases and contended that as no notice of demand was made, no interest was allowable under Act XXXII of 1839. All of them were cases under the Act. In the first place it must be pointed out that the Interest Act is not

(1) (1897) I.L.R., 20 Mad., 481. (2) (1908) I.L.R., 31 Mad., 250.
(3) (1918) I.L.R., 40 All., 497 (P.C.).

comprehensive of all claims to interest. Without going into details, it may be mentioned that the object of 3 & 4 Will., 42, s. 28, which was extended to India by Act XXXII of 1839 was to repeal the Usury laws relating to interest. Prior to the enactment of 3 & 4 Will. there was a law in the reign of Edward the Confessor which absolutely prohibited Courts from awarding interest in suits upon moneys lent. Attempts were made in the reign of Henry VIII to mitigate the rigour of this prohibition. 3 & 4 Will., c. 42, was enacted with a view to meet such a demand. It is clear from the language of the Act that the provisions dealt with only a particular class of cases, and enabled the Courts to give interest at the current rate under certain conditions. The framers were anxious that the right of interest, if any, otherwise possessed should not be interfered with by this enactment, and inserted the proviso to the effect that interest shall be payable "in all cases in which it is now payable by law." In India also ancient texts can be quoted to show that there was a prohibition against the taking of interest on moneys lent. One text of Manu exemplifies the abhorrence felt by the ancient sages on this question. Manu stated:

"Neither a Brahmin nor a Kshatria, though distressed, must receive interest on loans; but each of them, if he please, may pay a small interest permitted by law, on borrowing for some pious use, to the sinful man who demands it";

see Colbrooke's Digest, page 28. It looks as if when 3 & 4 Will. was extended to India, these provisions contained in the Hindu Law were kept in mind. It is therefore clear that the Interest Act is not exhaustive of the subject.

There is another difficulty in the way of applying the Interest Act to the present case. To attract its provisions the amount in dispute must be a debt or a certain sum payable at a certain time or otherwise. What is claimed now is a sum of money which on taking accounts would be payable to the plaintiff as her share. It was held in *Omrita Nath Mitter* v. *Administrator-General of Bengal*(1) that unless the amount is settled the Act is not applicable. In *London Chatham and Dover Railway Company* v. *South*

(1) (1898) I.L.R., 25 Calc., 54.

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Eastern Railway Company(1) a claim to payment under a building contract to be paid monthly on the certificate of the Engineer was held not to be a debt or sum certain if the amount was disputed; see also *Hill* v. *South Staffordshire Railway Company*(2). In *Ward* v. *Eyre*(3) it was held that a balance of account is not a sum certain within 3 & 4 Will., c. 42. The Calcutta High Court in *Rutnessur Biswas* v. *Hurishchunder Bose*(4) acted on the same principle. Therefore the Interest Act has no application to the case before us, and consequently the decisions relied on by the learned vakil for the appellant have no bearing on the matter we have to decide. On the other hand the cases to which the learned Advocate-General drew our attention establish that the Act was not intended to affect payments of interest or compensation in matters not coming strictly within the letter of the law. In *Miller* v. *Barlow*(5) the Judicial Committee point out that Indian Courts are Courts of both of law and of equity and that they can award as damages interest not covered by the Act. In *Hurro Persaud Roy* v. *Sham Persaud Roy*(6) a similar principle was enunciated by the Judicial Committee. In *Hamira Bibi* v. *Zubaida Bibi*(7) which was a case of dower, the Judicial Committee after saying that the Interest Act was not applicable allowed interest as damages. See also *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*(8) another decision of the Judicial Committee. There are decisions of the High Courts in which interest was allowed apart from the Act—*Alagappa Chettiar* v. *Muthukumara Chettiar*(9), *Fakir Muhammad* v. *Rangiah Goundan*(10), *Khetra Mohan Poddar* v. *Nishi Kumara Saha*(11), *Mohamaya* v. *Ram Khelawan*(12), *Chajmal Das* v. *Brij Bhukan Lal*(13) and *The Collector of Ahmadabad* v. *Lavji Mulji*(14). Mr. Ranga Achariyar contended that the above cases proceeded upon the principle that there was an established practice as to interest regarding the matter dealt with in them, and that the principle should not be extended to the case of Muhammadan lady claiming interest on an unascertained sum of money due to her as her share of the trade. We fail to see any difference in principle between

(1) (1892) 1 Ch., 120; s.c. (1893) A. C., 429.
(2) (1874) L. R., 18 Equity Cases, 154.
(3) (1880) 15 Ch. D., 130.
(4) (1885) I.L.R., 11 Calc., 221.
(5) (1871) L.R., 3 P.C.C., 733.
(6) (1878) I.L.R., 3 Calc., 654.
(7) (1916) I.L.R., 38 All., 581 (P.C.)
(8) (1915) 42 Calc., 914 (P.C.).
(9) (1918) I.L.R., 41 Mad., 316.
(10) (1913) 1 L.W.N., 181.
(11) (1915) 22 C.W.N., 488.
(12) (1915) 15 C.L.J., 684.
(13) (1895) I.L.R., 17 All., 511 (P.C.).
(14) (1911) I.L.R., 35 Bom., 255.

the cases to which we have referred and the case now before us. The only decision which supports Mr. Ranga Achariyar is *Marian Beeviammal* v. *Kadir Meera Sahib Taragam*(1). In that case there has been no discussion on the question and the reference to the earnings of interest shows that the decision should be confined to the facts of the case. The learned vakil for the appellant relied very strongly upon the observations of the noble and learned Lords in *London Chatham and Dover Railway Company* v. *South Eastern Railway Company*(2) for the proposition that in matters outside the Interest Act no interest is payable. The noble Lords who took part in the discussion, especially Lord HERSCHELL, point out that there has been a course of decisions in England which tied the hands of Courts from awarding interest on equitable grounds; and they regretted that they were obliged on the principle of *stare decisis* to decline to reopen the question. There is no such course of decisions in this country. On the other hand the Privy Council held very early that on principles of equity, justice and good conscience which are specially referred to in the Civil Courts Act, the Courts in India are at liberty to award interest in cases not coming within the purview of the Interest Act. The Indian Courts have followed this rule for a long time. The Courts in this country therefore are not hampered in the exercise of their equity jurisdiction in the same way that English Courts have been.

It is not necessary therefore to refer to another argument of the learned Advocate-General which rested the claim to interest upon the existence of a quasi-fiduciary relationship between the plaintiff and her brothers. We think the Subordinate Judge is right in allowing interest. But in our opinion he ought not to have allowed more than 6 per cent. The current rate of interest in this country is ordinarily that, and no special reason has been shown why it should be raised to 9 per cent. The analogy of the Trusts Act, section 23, to which the learned Advocate-General referred us, has no bearing on the present question and we are not prepared to allow compound interest as 6 per cent. The interest allowed will be reduced to 6 per cent throughout. Subject to this modification we dismiss the appeal with costs.

N.R.

(1) (1915) 29 I.C., 275.

(2) (1893) A.C., 429