holder got the decree transferred to it for execution. The order of the Kovilpatti District Munsif rejecting the execution petition was therefore right.

In the concluding portion of his judgment the District Judge directs that his order allowing execution should operate as a transfer of the decree to the Kovilpatti Court's file: but in so doing he appears to have overlooked the fact that at the date of his order an application for execution would apparently have been time-barred unless petitioner could claim the benefit of section 14 of the Indian Limitation Act—a point which has not been considered. No transfer order should be made so as to evade the provisions of the Limitation Act or to validate an invalid application.

The District Judge's order must be set aside and that of the District Munsif restored with costs to the appellant throughout.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

VENKATACHALAPATHY AYYAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

1918, November, 19, 20 and 27.

v.

THAVASI SERVAI AND TWO OTHERS (DEFENDANTS Nos. 1 TO 3), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2 and 4, and appendix D, forms 4, 7, 8 and 9—Mortgage suit—Decree for sale—Default of payment—Subsequent interest after date fixed in decree—Right of mortgagee—Subsequent interest, whether payable on aggregate sum of principal, interest and costs—Rate of interest—Discretion of Court—Mortgage bond—Stipulation for enhanced interest after default at twelve per cent, whether penal.

In a decree for sale on a mortgage, the decree-holder is, on default of payment by the mortgagor on the date fixed in the decree, entitled to subsequent interest on the aggregate amount of principal, interest and costs declared or found to be payable on that date; and such further interest should ordinarily be at the rate of six per cent per annum, but the Court has a discretion in the matter.

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* Appeal No. 409 of 1917.

VENKATA-CHALAPATHY AYYAR v. THAVASI SERVAI.

Sunder Koer v. *Rai Sham Krishen*, (1907) I.L.R., 34 Calc., 150 (P.C.), and *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Nadar*, (1898) I.L.R., 21 Mad., 364, referred to.

Where in a mortgage-bond there was a stipulation to pay enhanced interest at twelve per cent on principal and interest in default of payment of the principal with interest at nine per cent on a day fixed therein, and where it appeared that the debts to discharge which the mortgage was executed carried interest at twelve per cent and more:

Held, that the stipulation for such enhanced interest was not penal and could be enforced.

APPEAL against the decree of V. DHANDAPANI PILLAI, the Subordinate Judge of Madura, in Original Suit No. 11 of 1917.

The plaintiff sued on a mortgage-bond, dated 24th March 1910, executed by the first defendant to recover the amount due thereon and obtained a preliminary decree for sale. The mortgage bond provided for payment of the principal amount together with interest thereon at nine per cent per annum within a year from the date of the bond, and further provided as follows:

"In default to pay in the stipulated time as mentioned herein you shall add the interest accrued up to the date of default to the principal and you shall charge for the total amount interest at one rupee per cent per mensem and realize the principal and interest whenever you require, etc."

The Subordinate Judge, who tried the suit, passed a preliminary decree for sale, directing payment of the decree amount within six months from the date of the decree and declaring that the mortgagors should pay the principal amount of the bond, the interest due thereon at 9 per cent on the principal for one year and further interest at 10½ per cent from the end of the first year of the bond till the date fixed in the decree for payment on the principal amount and on the interest for the first year of the bond, and also awarding costs and subsequent interest at 6 per cent on principal and costs only but not on interest which had accrued due from the date of default till date fixed in the decree for payment and which had been included in the aggregate sum directed to be paid on the date fixed in the decree. The lower Court also reduced the rate of interest after date of default in the bond from 12 per cent to 10½ per cent per annum. The mortgagees preferred an appeal to the High Court claiming, *inter alia*, that they are entitled to subsequent interest

on the full aggregate amount of principal, *interest* and costs which was declared to be payable by the decree on the date fixed for payment, and also that they were entitled to the full rate of interest at 12 per cent per annum on the principal and interest after the time fixed in the bond and not at the reduced rate of 10½ per cent. The defendants pleaded that the mortgagees were not entitled to subsequent interest on any but the principal amount, and also that the enhanced rate of interest at 12 per cent was penal and unenforceable.

K. S. Jayarama Ayyar for appellants.

M. O. Parthasarathi Ayyangar and *M. O. Thirumala Achariyar* for respondents.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—I do not think the Subordinate Judge was right in treating the provision for payment of interest at 12 per cent, in default of payment on the date fixed in the mortgage bond, as penal. The original rate fixed no doubt is 9 per cent. But it is to be borne in mind that the debts to discharge which this mortgage was executed carried interest at 12 per cent and more. It could not therefore be said that the mortgagees were not justified in stipulating for payment of a higher rate if the money was not paid as promised.

The second question raised by the appeal is one of some importance. It is whether in a mortgage decree for sale interest should be computed on the aggregate amount found to be payable on the date fixed for redemption, that is, consisting of principal, interest and costs, or only on the principal if the ascertained amount is not paid and property has to be sold in consequence. The matter is now governed by Order XXXIV, rule 4, Civil Procedure Code, which, read along with rule 2, provides that in case of default the sale proceeds of the property sold shall be applied in payment of what is declared due to the plaintiff for principal and interest on the mortgage and for costs of the suit until the date fixed for payment together with subsequent interest and subsequent costs. This *primâ facie* suggests that the subsequent interest is payable on the aggregate amount and not on the principal alone. The form appended to this rule, form No. 4 of appendix D to the first schedule of the Code, clearly proceeds upon this above interpretation. But in forms Nos. 7, 8 and 9, which are forms of decrees for sale in cases where there are more than one mortgage on the property,

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ABDUR RAHIM, J.

provision is made for payment of such subsequent interest and costs as may be allowed by the Court. These forms certainly suggest that the rate of such subsequent interest is left to the discretion of the Court, and probably also that the Court may in a proper case refuse to allow any further interest.

Before the present Civil Procedure Code, the subject was dealt with in the Transfer of Property Act, and the question arose as to whether the Court had the power to allow interest at all for any period subsequent to the date fixed for payment, and as to the proper rate. The Privy Council held in *Sunder Koer* v. *Rai Sham Krishen*(1) that the Calcutta practice of allowing such interest at the Court rate, also adopted in this Court in *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Nadar*(2), was right, contrary to the view of the Allahabad High Court in *Amolak Ram* v. *Lachmi Narain*(3). Their Lordships at page 161 also observed:

"They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. It will be observed that according to the practice explained by the Registrar (that is, of the Calcutta High Court), which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money, and this is right, if the mortgagee is treated as a decree-holder or judgment-creditor, but would be wrong if the right to the interest depended on the terms of the mortgage bond."

No doubt this reasoning was intended to prove that the contract rate was not to be given, but it contains all the same a clear dictum that the practice in Calcutta of allowing interest on the aggregate sum was right.

I have tried to ascertain the practice in the Courts of this Presidency with reference to this matter. It would seem that in the mufassal Courts the practice cannot be said to be consistent

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(1) (1907) I.L.R., 34 Calc., 150 (P.C.). (2) (1898) I.L.R., 21 Mad., 364.
(3) (1897) I.L.R., 19 All., 174.

or uniform. When the High Court in its appellate jurisdiction passes a mortgage decree for sale, the practice seems to be to allow interest at the Court rate of 6 per cent on the aggregate amount. On the original side, the practice is to provide in the final order for sale for such subsequent interest and costs as may be allowed by the Court, and I understand that an application for the determination of such interest is generally made at the time of confirmation of the sale. The conclusion that I am led to is that, in default of redemption by payment on the date fixed, subsequent interest is to be calculated both on the principal and interest declared or found to be payable on that date, and such further interest is ordinarily to be calculated at 6 per cent, but the Court has a discretion in the matter.

The English law was also discussed at the bar, and, so far as I can gather, the practice of the English Courts in a foreclosure action is to compute subsequent interest on the aggregate amount, but in other actions such as by way of administration subsequent interest is allowed only on the principal amount apparently out of consideration for other creditors of the mortgagor. This is what is to be deduced from *Harris* v. *Harris*(1), *Whatton* v. *Craddok*(2), *Brewin* v. *Austin*(3), and *Elton* v. *Curteis*(4). But in my opinion a question like this has to be determined with reference to the provisions of the Civil Procedure Code and the practice of the Courts in this Presidency, if there is a uniform and well established practice.

There seems to be no special reasons in this case why interest should not have been allowed on the amount found to be due on the date fixed and I think that such interest should be allowed at the rate of 6 per cent.

The decree of the Subordinate Judge will therefore be modified by allowing interest from the date of default at 12 per cent instead of 14 annas per mensem decreed by the Subordinate Judge, and also by calculating interest at the rate of 6 per cent, on the aggregate amount, that is, principal and interest calculated as indicated above and on costs, and not merely on the amount of principal as decreed by the Subordinate Judge, from

(1) (1750) 3 Atk., 721.
(2) (1836) 1 Ke., 267; s.c., (1836) 48 E.R., 409.
(3) (1838) 2 Ke., 211. (4) (1881) 19 Ch.D., 49.

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OLDFIELD, J.

the date fixed for payment, that is 28th February 1918, until realization. The respondents will pay the appellants the costs of this appeal.

OLDFIELD, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

1918, November, 20 and 27.

ARUNACHALAM CHETTIAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

NARAYANAN CHETTIAR AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

*Paper Currency Act, Indian (II of 1910), sec. 26 (proviso)—Hundi payable to bearer, validity of—*Bona fide *customer drawing hundi on a bank without money to his credit, effect of.*

Where a hundi though drawn in favour of a specified person is made payable to bearer, it is void as being obnoxious to section 26 of the Indian Paper Currency Act (II of 1910) unless the hundi comes within the proviso to the section.

The object of the proviso being to enable *bona fide* customers to operate on actual or intended deposits, the fact that the drawer of the hundi had actually no money in the bank does not take the hundi out of the proviso if as a fact he intended to deposit money before presentment.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of Madura, in Appeal No. 404 of 1916, preferred against the decree of R. GOPALA RAO, the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 16 of 1915.

The facts are stated in the judgment of SESHAGIRI AYYAR, J.

Plaintiffs preferred this Second Appeal.

C. S. Venkata Achariyar for appellants.

M. Patanjali Sastri (with *A. Krishnaswami Ayyar*) for respondents.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit by an endorsee of a hundi. On the 9th of April 1914 the first defendant drew the

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* Second Appeal No. 1849 of 1917.