1884

SORBOJIT ROY v. GONESH PROSAD MISSER.

s. 1 and a similar s. 3. It repeals the Code of 1877 with respect to the whole of British India including the scheduled districts, and it contains a similar provision that the Act itself, the Code of 1882, is to be taken as substituted in the place of Act VIII of 1859 and Act X of 1877, in any Act, regulation or notification.

We must, therefore, again go back to the notification of 1867, strike out of it what the Act of 1877 had inserted, and insert in its place the Act of 1882.

The effect is that the Act of 1882 is now in force in the Sonthal Pergunnahs subject to the qualification contained in the notification.

Then there remains a second question. It is said that even supposing that an appeal lies under the present law from the Sonthal Pergunnahs, still the value of this appeal is too low to allow this Court to entertain it. We think that is not a correct construction of the law. The question depends upon s. 2 of Act XXXVII of 1855. That section says: "All civil suits in which the matter in dispute shall exceed the value of Rs. 1,000 shall be tried and determined according to the general laws and regulations." By that section the question is made to depend on the value of the suit, not on the value of the appeal. Inasmuch as the suit in this case is over Rs. 1,000 in value, although the value of the appeal is less, there is an appeal.

[The learned Judge then proceeded to give a decision on the merits, and dismissed the appeal with costs.]

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Norris.

1884
May 20.

BEHARY LOLL DOSS AND OTHERS (DEFENDANTS) *v.* TEJ NARAIN (PLAINTIFF).*

Bond, Suit on a—Penalty—Liquidated damages—Evidence—Oral Evidence when admissible to show intention of parties to treat a clause in a bond as penal.

Where a document contains covenants for the performance of several things, and then one large sum is stated to be payable in the event of a breach, such sum must be considered a penalty; but when it is agreed

Appeal from Original Decree No. 202 of 1882 against the decree of Moulvie Hafiz Abdool Karim, Khan Bahadoor, First Subordinate Judge of Bhaugulpore, dated the 31st of May 1882.

that if a party do or refrain from doing any particular thing, a certain sum shall be paid by him, then the sum stated may be treated as liquidated damages.

A bond for Rs. 20,000, which provided for payment of interest at the rate of Re. 1-4 per cent. per month, contained the following clause: "We hereby promise and give in writing that we shall pay year by year a sum of Rs. 3,000 *on account of the* interest . . . . . And in case of our failing to pay year by year the said sum of Rs. 3,000, the same shall be considered as principal and thereon interest shall run also at the rate of Re. 1-4 per cent. per month."

And in a suit on such bond the defendant sought to adduce evidence to show that after the execution of the bond the plaintiff stated that the clause was intended to operate as a penal clause, and that the conditions therein would not be enforced.

Held, that the clause was not penal, but in the nature of an agreement to pay liquidated damages, and that the plaintiff was entitled to a decree for the amount due in the bond with interest as agreed upon.

Held, also, that the evidence tendered was not admissible.

Baksu Lakshman v. *Govinda Kanji* (1) and *Hem Chunder Soor* v. *Kally Churn Dass* (2) approved and distinguished.

THE plaintiff brought this suit to recover the sum of Rs. 20,000 with interest due on a bond, dated the 30th June 1874.

The bond provided for the payment of interest at the rate of Re. 1-4 per cent. per month, or Rs. 3,000 per year, year by year, the principal to be repaid in the month of Bhadro 1285 (August—September 1878); that in case of their failing to pay the said sum of Rs. 3,000 year by year the same was to be considered as principal, and interest was to run thereon at the same rate of Re. 1-4 per cent. per month; and that in the event of the yearly interest not being paid when due, the plaintiff was to be at liberty to recover the same by suit. The bond further mortgaged a 2-anna share in a certain taluq by way of security for the repayment of the loan, and contained clauses providing for the non-alienation of the taluq, &c., until the plaintiffs should be repaid.

The defendants pleaded that the agreement to pay Rs. 3,000 year by year, and in the event of non-payment thereof that the same should be treated as principal and interest paid thereon, was in the nature of a penalty and could not be enforced, and they also set up a contemporaneous oral agreement by which the plaintiff undertook that this clause should not be enforced.

(1) I. L. R., 4 Bom. 594. (2) I. L. R., 9 Calc., 528.

1884

BEHARY LOLL DOSS v. TEJ NARAIN.

They also contended that, inasmuch as the plaintiff was at liberty to recover the amount of interest due each year by suit, he was not entitled to compound interest thereon, and that as the rate of interest was exorbitant, he should only be allowed the Court rate of 6 per cent. on the principal from the date on which it became due and repayable.

They further pleaded a payment of Rs. 10,000 in respect of the principal due on the bond for which the plaintiff had made no allowance.

The lower Court gave the plaintiff a decree, holding that the agreement was not a penal one, and that the defendants could not be allowed to give evidence of the oral agreement for the purpose of varying the terms of the bond under s. 92 of the Indian Evidence Act. The Court also found that the payment alleged by the defendants had not been made in respect of this debt but in respect of a totally different bond debt; and, holding that the plaintiff was entitled to the compound interest claimed, gave him a decree for a smaller amount than he claimed, on the ground that the compound interest had not been calculated in the proper manner.

Against that decree the defendants now appealed to the High Court.

Mr. *R. E. Twidale* for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Juggut Chunder Banerjee* for the respondent.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

TOTTENHAM, J.—This is an appeal from a decision of the Subordinate Judge of Bhaugulpore. Two points have been raised by the learned pleader for the appellant in support of the appeal. The first point is that, upon a true construction of the bond, the clause stipulating for the payment of interest at 15 per cent. per annum upon unpaid interest should have been construed as a penalty clause and not as a clause entitling the plaintiff to such interest as liquidated damages. The words of the bond are as follows: In case of our failing to pay year by year the said sum of Rs. 3,000 the same shall be considered as principal, and thereon interest shall run

also at the rate of Re. 1-4 per cent. per month." No doubt at times some difficulty arises in deciding whether the sum named in a contract to be paid upon a breach is a penalty or liquidated damages. But we do not think there is any difficulty in this case. The law upon the construction of contracts in this respect is thus laid down in Chitty on Contracts, 7th edition, p. 782: "It has been said to be very difficult to lay down any general principle in cases of this kind, but still there is one which may be safely stated, *viz.*, that where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty; but where it is agreed that if a party do (or as in this case refrain from doing) such a particular thing, such a sum shall be paid by him then the sum stated may be treated as liquidated damages." The rule is stated in the words used by Heath, J., in *Astley* v. *Weldon* (1); and that case was said by Tindal, C.J., in *Kemble* v. *Farren* (2) "to be decided on a clear and intelligible principle"; and in *Sparrow* v. *Paris* (3) Bramwell, B., in giving the judgment of the Court of Exchequer, says: "It is a sum payable in one event, it is not a sum to secure the performance of several matters; this is the distinction upon which the question turns, the names the parties give, the money, penalty or liquidated damages are immaterial. In this case the payment to be made depends upon the happening of one event only, *viz.*, the non-payment of Rs. 3,000 as interest at the end of the current year in which such interest should have been paid. We are therefore of opinion that Mr. Twidale's first point fails.

The second point urged was that the Subordinate Judge was wrong in refusing to receive parol evidence tendered by the defendants to show that after the execution of the bond the plaintiff stated that the clause in question was intended to operate as a penalty clause, and that the conditions therein contained would not be enforced. In support of this contention we were referred to two cases, *viz. Baksu Lakshman* v. *Govinda Kanji* (4) and *Hem Chunder Soor* v. *Kally Churn Das* (5). If we may say so, we

(1) 2 B. & P., 346.
(2) 6 Bing., 141.
(3) 7 H. & N., 594.
(4) I. L. R., 4 Bom., 594.
(5) I. L. R., 9 Calc., 528.

1884

DEHARY LOLL DOSS v. TEJ NARAIN.

entirely concur in those decisions; indeed, the luminous and able judgment of Melvill, J., in the Bombay case cannot but commend itself to the mind of every lawyer. But we are of opinion that the principle upon which those cases were decided is not applicable to the present case. But suppose it is, ought it to be applied in this case? We think not. Melvill, J., in *Baksu Lakshman* v. *Govinda Kanji* says: The rule, which on a consideration of the whole matter, appears to me most consonant, both to the statute law and to equity and justice, is this, namely, that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakeably from the conduct of the parties that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale; and, thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original oral agreement." Now, if we apply this rule, it is impossible to say that it appears clearly and unmistakeably from the conduct of the parties that the clause in question has been treated as a penalty clause, "the Court, therefore, will not give effect to it as a penalty clause," and will not therefore admit parol evidence of an alleged oral agreement that it was to be treated as such. Mr. Twidale urged that the fact of the plaintiff's abstaining from suing for the interest of each year as it became due was evidence of the intention of the parties to treat the clause as a penalty clause. We are unable to agree with him; if it is evidence of any thing, we think it is evidence of a contrary intention. In our judgment the second point fails, and we think this appeal must be dismissed with costs.

Appeal dismissed.